SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 218

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

versus

CHARLES FERRAN & COMPANY, INC., GLENS FALLS INDEMNITY COMPANY, UNDERWRITERS AT LLOYDS LONDON, ANDREW WEIR INSURANCE CO., LTD., FINE ART & GENERAL INSURANCE CO., LTD., NATIONAL PROVINCIAL INSURANCE CO., LTD., ORION INSURANCE COMPANY, LTD., ENGLISH & AMERICAN INSURANCE CO., LTD. "M", AND ECONOMIC INSURANCE COMPANY, LTD., "M" a/c,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes Alcoa Steamship Company, Inc. and respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 12, 1967 and the order of the same court denying a rehearing *en banc* herein entered on April 11, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit[1] is reported at 383 F. 2d 46, 1967 AMC 2578 and the order of that court denying rehearing[2] is unreported. The trial court, the United States District Court for the Eastern District of Louisiana, New Orleans Division, rendered an original opinion[3] at 242 F. Supp. 962, 1966 AMC 1029 which was modified by its opinion on rehearing[4] reported at 251 F. Supp. 823, 1966 AMC 1049.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1967 and a petition for rehearing *en banc* was timely filed by petitioner herein. The order denying rehearing was entered on April 11, 1968.

The jurisdiction of this Court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED

This is a suit in admiralty on a maritime claim and the decision presents the following questions:

1. Whether a clause limiting liability for negligence, omitted from the express terms of the agreement of

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[1]Appendix A, *infra*.
[2]Appendix B, *infra*.
[3]Appendix C, *infra*.
[4]Appendix D, *infra*.

the parties, may be incorporated in that agreement by implication.

2. Whether the public policy of the United States, as enunciated by this Court, precludes the ship repair yards of the United States, which possess a statutory monopoly on repairs to American flag vessels, from exacting such clauses limiting liability for negligence from ship owners who are required to utilize their services.

3. Whether such a clause limiting liability for negligence is to be construed, beyond its express terms, to grant such limitation to parties not named therein.

STATUTES INVOLVED

The statutory authorities involved here are 19 USCA 257, imposing a 50% duty on repairs to American flag vessels performed abroad, and the Louisiana Direct Action Statute, La. R.S. 22:655 enabling injured parties to proceed directly against a tort feasor's liability insurer. Both statutes are printed as Appendix E, *infra*.

STATEMENT OF THE CASE

The respondent, Ferran, is a ship repair contractor at New Orleans, Louisiana which entered into an oral agreement to perform certain repairs to petitioner's vessel, the SS ALCOA CORSAIR, at New Orleans. Both courts below found that Ferran's negligence in performing these repairs caused a fire which resulted in approximately $1,000,000 damages being sustained by

the vessel under repair. The remaining respondents are the Ferran liability insurers who had issued insurance policies providing liability insurance coverage to $1,000,000.

The oral agreement for the performance of the repairs in question did not in any manner include, by reference or otherwise, any limitation on Ferran's liability for negligence. The Court of Appeals for the Fifth Circuit, however, implied a limitation clause in the agreement based on the theory that since Ferran had performed prior repairs on petitioner's vessels which ultimately had been invoiced on a billhead form which included the limitation clause, this clause was to be "implied" in all contracts between these parties.

Suit had been filed against Ferran and against its liability insurers pursuant to the provisions of the Louisiana Direct Action Statute, La. R.S. 22:655. The limitation clause printed on the Ferran billhead forms did not name the Ferran liability insurers as parties whose liability was limited thereby but the decision of the court below, nevertheless, allowed those parties to receive the benefit of the limitation which the court had incorporated, by implication, in the contract of the parties.

ARGUMENT

The decision below plainly is at odds with the decisions of this Court striking down as invalid under similar circumstances clauses providing for exoneration from or limitation of liability for negligence. As a

result of its failure to recognize the underlying public policy established by the decisions of this Court, the Court of Appeals has incorporated by implication a limitation clause which was not a part of the agreement entered into between the parties, has extended that clause to afford protection to parties not included in its terms and has upheld the validity of the clause where the party obtaining limitation of its liability for its negligence is a member of a class which possesses and exercises a statutory monopoly under which the class members uniformly seek to impose such limitation clauses on the parties forced to deal with them, as a condition of obtaining the repairs required by their vessels.

As nature abhors a vacuum, so have the decisions of this Court established the abhorrence of our laws for contractual provisions denying or limiting liability for negligence. In no other area of admiralty law can a longer and more unbroken chain of decisions of this Court be found than those striking down such exoneration and/or limitation clauses. From the "both to blame" collision clause of the *ESSO BELGIUM — NATHANIEL BACON* case,[5] to the efforts by liability insurers to bring themselves within the purview of the Limitation of Shipowners' Liability Act,[6] to the *Bisso* and related decisions,[7] to the efforts by stevedore contractors to include themselves within the carriers' stat-

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[5] *United States vs. Atlantic Mutual Insurance Company*, 343 US 236.
[6] *Maryland Casualty Company vs. Cushing*, 347 US 409.
[7] *Bisso vs. Inland Waterways Corporation*, 349 US 85; *Boston Metals Co. vs. SS WINDING GULF*, 349 US 122; *United States vs. Nielson*, 349 US 129.

utory and bill of lading limitations of liability for damage to "packages"[8] and finally to the reaffirmation of its rejection of the tower's release from liability clauses of *Bisso* in the *Dixilyn* case,[9] the decisions of this Court have created an entire and comprehensive body of law governing such clauses. The Court of Appeals for the Fifth Circuit, in the present case, continues in its refusal to adhere to the decisions of this Court, which refusal had been manifested previously in the *Bisso* and *Dixilyn* cases and in its decision in *Collins & Co. vs. Panama R. Co.*[10]

A.

The Fifth Circuit's Doctrine of Inclusion by Implication is Diametrically Opposed to this Court's Holdings that Such Limitation/Exoneration Clauses must be Strictly Construed

The decision of the Fifth Circuit notes[11] that during the course of prior dealings between the parties, Ferran normally would perform repairs and after their completion forward an invoice which "was the only document to contain the so-called 'Red Letter' clause". Failure to protest the receipt of these billhead forms — which, when they were received were moot and meaningless as to all prior repairs performed by Ferran —

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[8] *Herd & Co. vs. Krawill Machinery Corp.*, 359 US 297.

[9] *Dixilyn Drilling Corp. vs. Crescent Towing & Salvage Co.*, 372 US 697.

[10] 197 F. 2d 893, as overruled by this Court in *Herd & Co. vs. Krawill Machinery Corp.*, footnote 8, *supra*.

[11] Appendix A, *infra*.

was characterized by the court as "acquiescence" in the "continued presence" of the clause on the invoices. This, by the decision of the Fifth Circuit was "sufficient to put Alcoa on full notice that the clause was implied in every repair contract". The philosophy and legal theory underlying this decision cannot be reconciled with the repeated decisions of this Court striking down limitation and exoneration clauses.

The inquiry here, of course, is whether such limitation of liability clauses are contractual provisions of such a beneficent nature as to permit the courts to construe them freely and liberally so as to find their very existence by implication. The answer, an emphatic "NO", has been unequivocally furnished by the decisions of this Court. As stated by Mr. Justice Frankfurter in his dissenting opinion in the *Bisso* case:[12]

> "* * * Since negligence is the ordinary basis for liability, relief from it should be clearly agreed upon between the parties and ambiguity should not leave the extent of such relief in doubt. Accordingly provisions for exemption are closely scrutinized by courts and doubt either as to the existence of the provision of exemption or its scope are resolved against relief from responsibility * * *."

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[12] *Supra*, footnote 7, 349 US 85, 100. In the same vein Justice Frankfurter in his dissent in *Boston Metals Co. vs. SS WINDING GULF*, 349 US 122, 124 noted that release was not to be allowed "unless the clarity of the language used expresses such to be the understanding of the contracting parties" and "unless the clause decisively requires this result".

Again in *Herd & Co. vs. Krawill Machinery Corp.*,[13] this Court held that :

> "* * * Any such rule of law, being in derogation of the common law, must be strictly construed for '[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express'. * * * Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties'."[14]

In contrast with these statements of the applicable law we find that the Fifth Circuit has allowed the limitation cluase to be "implied in every repair contract" between these parties on the most tenuous of grounds possible. These, specifically, are the fact that the ship repair industry in the United States generally seeks to extort such clauses from contracting shipowners coupled only with the fact that in the course of prior repair contracts, Ferran had forwarded billheads containing the "Red Letter" clause — where the re-

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[13] *Supra*, footnote 8, 359 US 298, 304-305,
[14] Citations omitted.

pairs had been performed without incident and without giving rise to any circumstances which would have caused the clause to come into operation or otherwise to receive consideration by petitioner.[15]

B.

The Fifth Circuit Has Refused to Follow the Public Policy Considerations Enunciated in this Area by the Decisions of this Court

We believe that the decision of the court below and its error can best be characterized by its own language in which it states that "no *overwhelming* public policy *requires*" it to declare the limitation invalid. We frankly do not know what would constitute, in the eyes of the court below, an "overwhelming" public policy consideration which would absolutely "require" it to conclude that the clause was invalid. We submit, however, that under the decisions of this Court and the public policy considerations enumerated therein, the clause plainly is invalid here.

First, there is no doubt but that the clause, as stated by the Fifth Circuit, "was standard in repair contracts with other domestic shipyards",[16] i.e., such yards

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[15]The clause itself was printed in such a manner that the Second Circuit, commenting on an identical form of "Red Letter" clause, had noted that the repair yard "contrived the reproduction of it in such fine print as to be readable only by the use of a magnifying glass", *California Tanker Company vs. Todd Shipyards Corporation*, 339 F. 2d 426 (CA, 2, 1964). A reproduction of the clause is contained in the transcript certified by the Clerk of the Court of Appeals herein, p. 1790.

[16]Appendix A, *infra*.

uniformly have sought to obtain its inclusion in their contracts, plainly a monopolistic practice.

Furthermore, since the ALCOA CORSAIR was an American flag vessel, it was subject to a 50% duty on any repairs which were not performed in domestic shipyards.[17] This imposition of a 50% duty on foreign repairs obviously precludes the American flag shipowner, such as petitioner, from effecting its repairs other than in the domestic yards. Having this statutory monopoly, established in this record beyond cavil, the shipyards in this country, in the language of the Fifth Circuit, have caused the "Red Letter" clause to become "standard in repair contracts with [such] domestic shipyards". All the monopolistic elements of *Bisso* are present here; if this is not sufficient to require the court below to find that the clause contravenes public policy, we can visualize no circumstances under which it would find that such public policy considerations exist.

C.

The Fifth Circuit's Liberal Construction of the Limitation Clause to Include as Beneficiaries the Insurers of Ferran who were not named therein is Directly Contrary to the Decisions of this Court.

Once the court below had brought the limitation clause into existence by its doctrine of implication,

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[17] 19 USCA 257, Appendix E, *infra*.

presumably it was only a short step then to breathe as much life as possible into its offspring by construing its terms so as to include parties who plainly were neither enumerated nor otherwise included therein. The clause was one under which Ferran stated that "we" limit "our" liability but said nothing about the liability of its insurers. At the same time Ferran obtained, for the benefit of its customers,[18] liability insurance of $1,000,000. Quite obviously, had Ferran sought to include its liability insurers in the limitation clause, this could have been accomplished simply by stating that "we limit our liability and that of our liability insurers" to the limitation figure. This was not done. Under the express terms of the clause the liability insurers were not included until the Fifth Circuit, by its most generously loose construction of the clause, enabled them to come within its shelter.

The court below, to reach this end, held that the limitation of the "Red Letter" clause was not a "personal defense" under Louisiana law. Since "personal defenses" are defenses arising by operation of law,

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[18]It is well settled that a policy of liability insurance, under the Louisiana Direct Action Statute, is for the benefit of parties injured in their dealings with the assured. *Jones vs. Mid-South Insurance Company* 358 F. 2d 887 (1966), citing *West vs. Monroe Bakery*, 217 La. 189, 46 So. 2d 122 (1950); *Musmeci vs. American Auto Ins. Co.*, 146 So. 2d 496 (La. App., 1962). As stated by the dissent in *Maryland Casualty Company vs. Cushing*, footnote 6, *supra*, "Louisiana has tried to make certain that all liability insurance will get to those for whose protection it was purchased". The statute expressly so provides: "It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons . . . to whom the assured is liable".

i.e., "granted by law" as stated by the decision of the Fifth Circuit, this obviously is correct but does not support, in any manner, the conclusion reached by the decision below.

The "Red Letter" clause is a contractual defense, the application of which can be determined only on the basis of the language and intent of the parties. Here the plain and express language of the limitation clause did not pretend to include the liability insurers whose liability remained limited only to those limits which were established by their policies of insurance. Further, the very reference to Louisiana law in this area dealing with a maritime contract manifestly is erroneous and certainly the gratuitous and unsupported statement that "an analysis of this issue on the general maritime law yields the same results" can add nothing to this portion of the decision.

In the language of the *Herd* decision, the Ferran underwriters, in fact, find themselves in a situation where "no statute has limited [their] liability, and [they were] not a party to nor a beneficiary of the contract * * * and hence [their] liability was not limited by that contract.[19]

CONCLUSION

As stated by Mr. Justice Harlan,[20] "certainty in the law governing commercial transactions of this kind is an overriding consideration which would not be pro-

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[19] *Herd & Co. vs. Krawill Machinery Corp.*, footnote 8, *supra*.
[20] In the concurring opinion in the *Dixilyn* case, footnote 9, *supra*.

moted by opening the *Bisso* rule to indeterminate exceptions". This is precisely the result which has been obtained by the Fifth Circuit in pursuing its own policy of dealing with release and limitation clauses on the basis of a liberality of construction and application which cannot be reconciled with the decisions of this Court. For the foregoing reasons we submit that a writ of certiorari should be granted herein and that the decision of the court below should be reversed by this Court, to avoid conflict and confusion in this important area of law.

Respectfully submitted,

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CERTIFICATE

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing application to respondents' counsel of record, Messrs. George B. Matthews and Leon Sarpy, by mailing a copy thereof, postage prepaid, to them at their offices at New Orleans, Louisiana on this ____ day of June, 1968.

Benjamin W. Yancey

APPENDIX A

Opinion of the
United States Court of Appeals
for the Fifth Circuit

(No. 23,555 — Title Omitted)

(September 12, 1967.)

Before BROWN, Chief Judge, MOORE* and BELL, Circuit Judges.

MOORE, Circuit Judge: Alcoa Steamship Company, Inc. (Alcoa) brought a libel in the United States District Court for the Eastern District of Louisiana before Hon. Frank B. Ellis, against Charles Ferran & Co., Inc. (Ferran), a ship repair contractor, and Ferran's liability underwriters (providing coverage up to $1,000,000) to recover damages caused to Alcoa's ship, the *SS Alcoa Corsair*, by a fire allegedly caused by the negligence of Ferran in executing certain repairs to the *Corsair's* boiler. The district court found Ferran liable for the damages, but further found that the contract to repair was governed by a "Red Letter" clause limiting Ferran's liability to $300,000. In addition, the district court determined that the doctrine of avoidable consequences was applicable and left it to a Special Master, appointed to resolve the issue of damages, to assess the portion of damages (not recoverable by Alcoa) attributable to Alcoa's negligence in failing

*Of the Second Circuit, sitting by designation.

speedily to arrest the spreading of the fire. Ferran has appealed from the district court's finding of negligence chargeable to Ferran and from that court's failure to conclude that the unseaworthiness of the vessel at the time of the accident should mitigate, if not foreclose, Ferran's accountability for damages; Alcoa has appealed from the findings that (1) the "Red Letter" clause was a part of the repair contract, (2) the clause was not invalid as against public policy, and (3) the clause, if valid, was available as a defense to the underwriters. In addition, Alcoa urges that Ferran did not sustain its burden of proof below in establishing any acts of Alcoa's negligence that would bring the doctrine of avoidable consequences into play.

The District Court's findings:

The facts as found by the district court are substantially as follows:[1] the *Corsair* arrived in New Orleans from Mobile, Alabama, on October 4, 1956, at which time Alcoa's local port captain notified Ferran of certain general repairs which the ship needed (as will be discussed later, Ferran had traditionally done most of the *Corsair's* repair work since the vessel's commission in 1947). One of the repairs requested was the rebricking of the floor of the fire box of the starboard boiler. No work was done on the boiler on that

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[1]The district court wrote two opinions reported in 242 F. Supp. 962 (E.D. La. 1965) and in 251 F. Supp. 823 (E.D. La. 1966); the findings with respect to the historical facts reported in the first opinion were not altered in the second opinion which was directed chiefly at legal points raised by the parties during reargument.

day, but Ferran assisted the United States Coast Guard and the American Bureau of Shipping on their inspection of the *Corsair*, both agencies concluding at the end of their inspection the following day that the ship's gear, equipment and fittings, including its fire-fighting system, were in good order.

On the morning of October 5th, Ferran's labor gang boarded the *Corsair* to begin the work on the fire box. Some description of the boiler in question is necessary in order to understand the sequence of events that followed. The two identical boilers on the ship operate on a combustion principle, burning a mixture of air and oil, the oil being pre-heated to about 230 degrees F. by circulation through a heating system. The oil descends from a manifold pipe located along the top of the boiler through four "droplines" — coupled to valves at both top and bottom of each — into four burners spaced along the side of the boiler, where it is atomized, mixed with air (driven in by a forced air blower) and sprayed into the firebox. The burner positions along the boiler are commonly known as registers. To gain access to the firebox, any one register may be removed upon disconnecting its dropline at both ends and undoing a series of bolts, thus creating an opening wide enough to pass materials through. The registers are numbered arbitrarily one through four from forward to aft with numbers two and three being lower on the boiler than the other two. On each boiler there is also an access door which is large enough to allow a man to enter the firebox.

The district court found that to rebrick the firebox, Ferran employees opened the access door and removed register #3, thus by necessity removing the #3 dropline by uncoupling it at its top and bottom. At 9:30 in the evening of the 5th, the brickwork was finished and the Ferran workers replaced the register. At the point where the #3 dropline was to be reconnected at its upper end, there was a male fitting whose threads were worn and which should have been replaced by Ferran. A Ferran employee nevertheless tightened the defective fitting. The job completed, the Ferran employees cleaned up the area, took their tools and left the ship, leaving instructions written on a blackboard for the night fireman to fire the burners for short periods of time to dry the brickwork.

Alcoa's fireman Gomez came on duty at 2:00 A.M. and fired two of the burners, including the burner on the #3 register, for 10 to 15 minutes, experiencing no difficulty. At 4:00 A.M., fireman Deale relieved Gomez, all of the burners at that point being off. At about 4:20 A.M., Deale made preparations to continue the rotation of the burners. Desiring to fire burner #3, he circulated the oil to raise it to the proper temperature and probably turned on the forced draft blower (apparently necessary to clear the firebox of any fumes prior to the insertion of a lighted torch). He then lit a torch, turned on the fuel valve at the top of dropline #3, inserted the torch into the burner barrel, and began to open the valve at the bottom of dropline #3. At this point, hot oil hit him in the face and arm "from up above" (Deale's words), causing him to jump back, thereby withdrawing the torch from the burner, the

torch igniting the oil now gushing from the parted defective fitting to which the #3 dropline had been connected.

The intense heat of the fire prevented Deale from reaching the fuel shut-off valve located, unfortunately, at the forward end of the boiler and thus totally inaccessible once the fire had begun. Rushing to the after end of the engine room, hoping to go through the CO_2 room to reach the remote controls for the fuel oil system, Deale found the door to the CO_2 room locked. Although Deale nevertheless managed to escape from the engine room, he was unable to do anything to control the fire. Night Relief Engineer Moses, overcome by smoke and heat, was the sole casualty of the fire, dying of asphyxiation on the generator flat one level above the fire room.

The fire raged on for some forty minutes before the *Corsair's* Chief Engineer, not on board at the time the fire started, arrived on the scene and successfully cut off the supply of boiler fuel feeding the fire. There was evidence that the skeleton crew of 20 on board at the time of the fire were unable to cut off the fuel supply due to their ignorance as to the location of the controls. The district court also found that two doors leading out of the engine spaces, clearly marked "KEEP THESE DOORS CLOSED AT ALL TIMES", were wide open at the time of the fire, thus aggravating the extent of the damages caused by the fire. The *Corsair* was badly damaged.

The applicable law:

Alcoa seeks to recover $1,000,000 in damages, either in contract on the theory that Ferran breached its warranty of workman-like service, see *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133-34 (1956), or in tort on the theory that Ferran was negligent in repairing the boiler. The question immediately arises as to what law governs the various facets of Ferran's repair contract with Alcoa. This involves a two-step procedure: (1) Was the contract maritime and, thus, subject to maritime law? (2) If so, is the particular issue to be resolved of such a local nature that state law should be applied? See *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). For even though admiralty suits are governed by federal substantive and procedural law, courts applying maritime law may adopt state law by express or implied reference or by virtue of the interstitial nature of federal law. See *Wilburn, supra, SS Philippine Jose Abad Santos v. Bannister*, 335 F.2d 595 (5th Cir. 1964).

It is well settled that a contract to repair a vessel is maritime. *North American Steamship Co. v. Hall Brothers Co.*, 249 U.S. 119 (1919), 1 Benedict on Admiralty, §66 n.32 (6th ed., 1966 Supp. by C. R. Knauth). Consequently, a shipowner has a maritime cause of action whether he sues in contract for a breach of warranty of workmanlike service or in tort for the negligent performance of a maritime contract. See *Southport Transit Co. v. Avondale Marine Ways, Inc.*,

234 F. 2d 947, 955 (5th Cir. 1956). Federal law governs the construction of the terms of the repair contract, see *Booth Steamship Co. v. Meier & Oelhof Co.*, 262 F. 2d 310 (2d Cir. 1958), and would also appear to govern the standard of performance due under the contract. See *Southport Transit Co., supra.* Thus the applicability of state law in repair cases is sharply limited to issues not touched by maritime law where state statutes fill in the gap in a manner not destructive of the uniformity admiralty seeks. See *The Tungus v. Skovgaard,* 358 U.S. 588, 594 (1959), see generally Comment, Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters, 64 Colum. L. Rev. 1084, 1092-96 (1964). In the context of the instant case, federal law governs every issue with the exception of the applicability and effect of the Louisiana direct action statute discussed *infra.*

Ferran's negligence:

Ferran attacks the district court's findings that (1) Ferran's employees removed register #3 at all (thus Ferran maintains that the upper coupling on the #3 dropline was never undone), and (2) the coupling was defective prior to the fire (it being established at the trial that the coupling was in a damaged condition after the fire). Ferran further contends that the break in the coupling was caused by an explosion set off when Deale negligently put the lighted torch into the burner without having turned on the forced draft blower to clear the fumes out of the fire box.

Ferran recognizes that in reviewing the judgment of a district court sitting without a jury in admiralty, an appellate court exercises no greater scope of review than it exercises under F. R. Civ. Pro. 52(a) and, thus, may not set aside a district court finding unless "clearly erroneous." *McAllister v. United States*, 348 U.S. 19 (1954). Ferran argues, however, that the "clearly erroneous" test does not apply to a district court's findings on negligence as an appellate court is just as able to determine whether a given fact situation constitutes negligence as the district court. See *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 360 F. 2d 774 (2d Cir. 1966). Correct as this statement may be, a glance at Ferran's allegations of error discloses that it is attacking not the district court's conclusions on negligence but that court's findings with regard to the underlying, historical facts. Thus, we may not set aside the above lower court's findings unless we find them to be "clearly erroneous".

With respect to whether Ferran did or did not remove register #3, thus necessitating the removal of the #3 dropline, the evidence was highly conflicting. A brief review of the testimony of several witnesses illustrates the difficulty the district court faced in attempting to reconstruct the course of events at a trial held six and one-half years after the fire.

None of Ferran's witnesses testified directly that the #3 register had been removed. Hubert H. Hambrice, Ferran's then labor superintendent who was on duty from 8:00 A.M. to 5:00 P.M. on October 5th in

charge of the labor crew working on the *Corsair's* starboard boiler, identified on a photograph of the boiler the #2 register (lower front) as the one that had been removed to facilitate the repairs. He further indicated that the access door had been opened, but that no other registers had been removed. Hambrice could not recall, however, whether the register had been removed before or after he came aboard, whether it had been replaced before he left or any other details about the job. In fact, the only thing he could remember clearly was that the #2 register had been removed.

Willie Harris, a Ferran day shift laborer who had worked on the boiler, testified that the lower front register (#2) was the only register removed. In an earlier deposition, however, Harris had been unable to recall which register had been removed. At the trial, he explained this discrepancy by remarking, "it came to me [after the deposition] just how this thing could be done."

Louis G. Tavan, Ferran's superintendent of repairs, testified that the #2 register was off, but conceded on cross-examination that there may have been two registers off; he could not recall the conditions of the various droplines.

Daniel Reed, a labor pusher for Ferran whose job it was to get men to clean up the trash in the boiler room, stated that "the lower register next to the access door" (#2) was the only one that was removed. In an earlier deposition, however, he had identified

the #3 register as the one removed, by pointing to it on a photograph that distinctly showed the positions of the various registers in relation to the access door. His explanation at trial that he had been confused as to the numbering of the registers at the previous identification did not explain his earlier unequivocal designation on the photograph of the lower aft register away from the access door.

Two other Ferran employees present during the repair job, James Hill and Fee Carr, could not remember which register had been removed.

Alcoa's witnesses had a different story to tell. Roy T. Lemon, who had been Chief Engineer on the *Corsair* in October, 1956, was quite sure that both lower registers (#'s 2 and 3) and the access door had been removed. Similarly, Floyd L. Johnson who had been Third Assistant Engineer testifed that both lower registers were out. Night relief engineer, Donald Kent, who came on board at 5:00 P.M. on October 5th stated at the trial that, although he could not remember clearly, his best recollection was that the lower aft register (#3) was out. He was unable, however, to explain why he had told the Coast Guard at an enquiry held shortly after the fire that the #2 register was the one that was removed. Alcoa's version of which register was off was further weakened by the adverse inference that arose when it failed to produce its day fireman, who was readily available, who had been on duty in the boiler room tending the port boiler from 8:00 A.M. to 4:00 P.M. on the day the repairs were carried out by Ferran.

Somewhere in between these two versions is the testimony of Peter J. Marchetta, Ferran's night labor foreman who came on board the *Corsair* shortly after 5:00 P.M. He testified that the boiler rebricking was almost completed when he arrived and that the registers were "all in". Marchetta recalled that he set about to hook up the various droplines; that he had hooked up the bottom and the top of dropline #1, but had only fastened the bottom fittings of droplines 2, 3 and 4 which were already attached at their tops. He did check the tops of those droplines, however, and finding the top of #3 loose, he had tightened it with his wrench two half-turns, thus allowing the inference that some one else had done it up hand tight shortly before. He further remembered that the upper fitting on the #3 dropline had been painted with aluminum paint.

The district court found as a fact that the #3 register and the #3 dropline had been removed and replaced by Ferran employees, apparently believing Alcoa's witnesses while disbelieving most of Ferran's. This conclusion was based to a large extent on Marchetta's testimony, the one Ferran witness the court found credible, that he had tightened the upper fitting on the #3 dropline, as the court stated:

> ". . . one or more of the Ferran employees re-engaged the female fitting of the #3 dropline with [the] improper male fitting.
>
> "The identity of the Ferran employee or employees who made this reconnection is not

absolutely clear, as there may have been someone other than Marchetta who had put the fittings together hand tight before Marchetta used a wrench to tighten the coupling.

"The Court finds as a matter of fact that what is absolutely clear is that Ferran employees did reconnect the upper coupling of the #3 dropline with a worn and consequently improper fitting . . . ." 242 F. Supp. at 968.

In view of the conflicting testimony on this issue, the trial judge had to resolve this dispute largely upon his judgment of the credibility of the witnesses. His finding that Ferran had disconnected and reconnected the #3 dropline is certainly not clearly erroneous.

The same conclusion must be reached, we believe, with respect to the district court's finding that the male fitting to which the upper end or dropline #3 was connected was defective when the Ferran employee reconnected the coupling, and should have been replaced (that Ferran had a duty to replace defective parts was admitted by its superintendent Tavan). Once again, however, the evidence is susceptible of differing interpretations. For example, Alcoa's fireman Gomez had fired the burner at the #3 register for 10 to 15 minutes to dry the brickwork after the repairs had been completed but before the fire. During this time, dropline #3 was subjected to the usual oil pressures incurred in feeding the burner, but did not part. Relying on the testimony of its expert metallurgist, Dr. M. M. Gilkeson, that a fit-

ting is either good or bad and either holds pressure or does not, Ferran argues that if the fitting held pressure during Gomez' operation of the boiler, it must have been in good condition. Ferran contends that the damage to the fitting — the fitting itself was introduced into evidence at the trial and shown to be in a badly stripped condition — must have been incurred during the fire, probably as a result of a flareback caused by Deale's negligence in attempting to light the #3 burner. See discussion, *infra*. On the other hand, Ferran's own machinist superintendent, Benjamin G. Morrison, testified on cross-examination that the damaged condition of the fitting was probably due to constant wear and strain and not from fire. Similarly, Dr. Gilkeson conceded on cross-examination that it is conceivable that a long series of removals and replacements might have stripped the fitting and further conceded that the fitting could have been defective during Gomez' firing and yet held together only to part finally when Deale went to light the burner. Concerning Ferran's explosion or flareback theory, the expert commented that although he had examined the fitting with the explosion theory in mind, he could detect no evidence that the damage to the fitting was caused by a sudden explosion.

Ferran also contends that there was a failure of proof that the condition of the fitting at the trial was the same as immediately after the fire and was neither caused by, nor aggravated by, severe tests performed on it prior to trial. This point is without merit as (1) Morrison testified that the damaged con-

dition of the fitting had been brought to his attention shortly after the fire, (2) Lieutenant Commander Walton D. Alley, Jr., the Coast Guard's Investigating Officer, testified that he had gone aboard the *Corsair* the day after the fire, had examined the fitting then and there and had found the threads "definitely upset", and (3) Dr. Gilkeson, an observer at the various tests performed on the fitting, related in detail the steps taken to test the condition of the fitting, his testimony allowing only the conclusion that the fitting was badly damaged prior to the tests.

The foregoing discussion demonstrates, we believe, that the district court's finding with respect to the condition of the fitting prior to the fire is amply supported by the record.

Finally, Ferran contends that the district court erred in rejecting its explosion theory. Although its expert Dr. Gilkeson could report no evidence of an explosion from the fitting itself, he did not foreclose the possibility that an explosion caused the fitting to part. Ferran's hypothesis is that the fire was caused, at least in part, by Deale's negligent lighting of the burner without having turned on the forced draft blower, apparently necessary to clear the boiler of excessive fumes prior to the insertion of a lighted torch. In support of its position, Ferran points to the testimony of Machinist Superintendent Morrison that he found the valve for the forced draft blower in an off position immediately after the fire and the fact that the steel burner head Deale had inserted in the #3 register was found smashed into several fragments.

Once again, however, there is evidence on the record to contradict Ferran's position. Ferran's General Manager, Albert M. Kreihs, had gone into the engine room on the day of the fire and testified at the trial on cross-examination that to the best of his knowledge from examining the boiler after the fire there was no explosion, and Commander Alley recalled that there was "no evidence of an explosion of any magnitude whatsoever," although he did indicate that flarebacks normally leave no evidence within a boiler. Commander Alley also expressed his opinion that the burner throat was probably fractured either on account of the intense heat of the fire or by striking something, but would not have been fractured by internal pressure inside the boiler.

The testimony of Ferran's expert Jawn W. Marques, who held a Chief Engineer license and had worked on vessels with power plants similar to the *Corsair's*, that, on the basis of a hypothetical question posed to him, the casualty was caused by a flareback is not too helpful as this opinion was based on the assumption that Deale had not turned on the forced draft blower, a question of fact in controversy. Deale himself testified that he had turned the blower on and Alcoa's Chief Engineer Lemon testified in direct opposition to Ferran's Morrison that in his inspection immediately after the fire he had found the valve of the forced draft blower "opened slightly" in a normal operating position.

The district court found Deale's testimony to be clear and credible and further found that the physi-

cal facts did not support the explosion theory. The record clearly supports these findings thus reenforcing the conclusion that the sole proximate cause of the fire was the defective fitting on the #3 dropline.

Avoidable consequences:

In its first opinion, the district court found that the *Corsair* was unseaworthy due to the inaccessibility of the shut-off valve on the boiler and the locked CO_2 room and, also, indicated that the crew had been negligent in not knowing where the control valves were located on the ship. The court concluded "that these acts of negligence and unseaworthiness warrant the application of the doctrine of 'avoidable consequences'." In its second opinion, after reargument, the court qualified this statement by agreeing with Alcoa that the doctrine of avoidable consequences "does not apply to conditions or conduct attributable to Alcoa which preceded Ferran's negligence." The court then reserved the question of whether there was a sufficient failure on Alcoa's part to mitigate damages after the fire had begun to bring the doctrine into play, stating that such a question was an issue of damages to be decided by the Special Master.

The court relied on *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F. 2d 957 (5th Cir. 1956), for the proposition that "avoidable consequences" apply only after a defendant's negligence is complete. In the instant case, Ferran's negligence was complete when its employees left the ship. The fire itself was started solely on account of Ferran's negligence,

so there is no question of contributory negligence barring or reducing recovery. The district court further relied on the principle that a tortfeasor takes his victim as he finds him.

The district court was correct in its second opinion in limiting the application of the doctrine to acts attributable to Alcoa after the fire. The general rule has been stated as follows:

> "After the original impact or injury (to which plaintiff's negligence did not contribute), plaintiff's negligence may intervene to aggravate its consequences. Thus he may neglect to carelessly treat a wound, so that it gets infected and he loses his limb or his life. Or he may fail to take reasonable steps to protect property damaged or exposed by defendant's negligence. In cases like these plaintiff may not recover for the aggravation to his injury toward which his negligence contributes. This notion is sometimes referred to as the 'duty' to mitigate damages or the rule of avoidable consequences." 2 Harper & James, The Law of Torts §22.10. at pp. 1231-32 (1956) (footnotes omitted).

Here, the condition of the ship at the time of the fire, whether unseaworthy or seaworthy, is irrelevant to the question of damages as the sole cause of the fire was Ferran's negligence. Thus, for example, the fact that someone had locked the door to the CO2 room and had thus prevented Deale from reaching

vital controls does not of itself reduce the damages recoverable by Alcoa as the door was locked before the fire and in no way was a cause of the fire. Any negligent facts attributable to Alcoa after the fire, however, such as a failure of crew members to act, consistent with their then existing state of knowledge and skill, with due dispatch in arresting the conflagration, can be considered in mitigation of damages.

Alcoa, in its appeal, argues that Ferran failed to sustain its burden below of establishing any negligence on Alcoa's part after the fire began as the district court stated that "facts relating to possible reduction of any damage award due to Alcoa's failure to mitigate such damages were not presented with sufficient particularity to support a finding, one way or the other." Thus, Alcoa argues, Ferran should be foreclosed from relitigating the issue. The district court, however, expressly found that the propriety of Alcoa's conduct after the fire began was an issue of damages to be tried before the Special Master. Thus, the court's above-quoted statement cannot be read to foreclose Ferran from submitting further evidence on this point at any future proceedings held before a Special Master.

Applicability and validity of the "Red Letter" clause:

As mentioned earlier, Ferran had performed repairs on the *Corsair* many times prior to the time of the fire, and had an informal understanding with Alcoa to handle all the repairs to the *Corsair* when she was in New Orleans. The usual repair contract

was made and performed in roughly the following manner: Upon the *Corsair's* arrival into port, Alcoa would notify Ferran of the repairs needed. Ferran's superintendent would go on board, survey the work to be done, and submit a written estimate to Alcoa. If Alcoa approved, it would send Ferran an order on Alcoa's form and the work would be done. Upon completion of the work, Ferran would send Alcoa an invoice, usually after the *Corsair* had sailed. The invoice was the only document to contain the so-called "Red Letter" clause which read in part:

> "We contract only upon the following terms, applicable to every contract, ...
>
> "Furthermore, we undertake to perform work on vessels . . . only upon the condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract, tort or otherwise, to its owners . . . for any injury to such vessel . . . unless such injury is caused by our negligence . . . and in no event shall our aggregate liability . . . exceed the sum of $300,000.00."

Alcoa admits receiving an invoice for the October 5th repairs to the starboard boiler containing the above clause. Alcoa also admitted that it was aware of the existence of the clause on the various invoices and had read it. The company also knew that such a clause was standard in repair contracts with other domestic shipyards.

Ferran maintains, and the district court so concluded, that the "Red Letter" clause was implied in every repair contract from the fact that Alcoa knew of the clause and acquiesced in its continued presence on the invoices. Alcoa argues strenuously that as the clause was never put on any document until after a repair contract was completed, it never became a part of any repair contract. While this issue may be a good deal closer than the district court indicated, the practice in the industry and the previous Alcoa-Ferran relations were sufficient to put Alcoa on full notice that the clause was implied in every repair contract. See 3 Corbin on Contracts, §556 (1960 ed.).

Alcoa's second line of assault, challenges the clause as invalid as against public policy, relying on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), where the Supreme Court knocked down a clause purporting to release a tug owner from all liability for negligence in connection with a towage contract. The Court cited two reasons for the decision: (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in an inferior bargaining position. 349 U.S. at 91. Neither reason is applicable to the instant case as (1) potential liability for $300,000 should deter negligence, and (2) Alcoa's bargaining position is not that inferior as evidenced by the fact that in a repair contract with Ferran subsequent to the fire, the "Red Letter" clause was specifically excluded. No overwhelming public policy requires us to declare a $300,000.00 limitation invalid.

Availability of limitation to Ferran's underwriters:

In addition to suing Ferran, Alcoa sued Ferran's underwriters pursuant to the Louisiana Direct Action Statute, LSA-Rev, Stat. 22:655. The applicability of this Louisiana statute in a federal admiralty action against a shipowner's insurer has, for a long time, been the subject of controversy, see *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954) (court split 4-4-1 on whether the statute was invalid as conflicting with the 1851 federal limitation of shipowner's liability act). The case of *In the Matter of Independent Towing Co.*, 242 F. Supp. 950 (E.D. La. 1965), represents the most recent attempt to resolve the federal-state conflict, allowing an injured party to recover to the full extent of policy coverage from a shipowner's insurer, but at the same time preserving for the shipowner insurance proceeds to cover his limited liability. See also *Guillot et al. v. Cenac Towing Company, Inc.*, 336 F. 2d 898 (5 Cir., 1966).

The instant case does not present that particular state-federal conflict, as the applicability of a state direct action statute against a ship repairer's insurer is not inconsistent with any overriding federal admiralty policy. The remaining question is whether Ferran's $300,000 limitation is available to its underwriters.

Given the applicability of the Louisiana statute to give Alcoa a direct cause of action against Ferran's underwriters, the question arises whether state law or general maritime law should be applied to de-

termine what defenses are available to the underwriters. This choice of law problem does not involve an *Erie*[2] or *Klaxon*[3] issue as a federal court resolving an admiralty question does not sit, in effect, as only another state court. See *Kenney v. Trinidad Corp.*, 349 F. 2d 832, 834-35 (5th Cir. 1965), *cert. denied* 382 U.S. 1030 (196). Instead the question to be answered is, when a federal court adopts a state cause of action in an admiralty case, how much nonprocedural state law rides along with it? See the *Tungus v. Skovgaard, 358* U.S. 588 (1959), *Kenney, supra.* However, in this case, application of state or federal law yields the same result; therefore, we need not resolve the choice of law problem, although we note that the general policy of leaving the regulation of matters touching upon insurance to the states would tend to support the district court's application of state law below.

The district court applied Art. 2098 of the Louisiana Civil Code and concluded that Ferran's contractual limitation of liability was not a "personal" defense unavailable to its underwriters, pointing out that within the meaning of Art. 2098, "personal" defenses were limited to the type of defense — such as lunacy, bankruptcy, minority, governmental immunity, etc. — granted by law to all members of a particular class as a matter of public policy. A limitation of liability agreed to by parties in relatively equal bargaining positions does not fall into that category. As the dis-

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[2]*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).
[3]*Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

trict court stated, "Insurers are not entitled to benefit from a defense based on the insurer's publicly protected legal status, but should benefit from the contractual defenses of their insured." An analysis of this issue under general maritime law yields the same result.

Judgment affirmed.

APPENDIX B

Order of The
United States Court of Appeals
For the Fifth Circuit

On Petition for Rehearing

(No. 23,555 - Title Omitted)

(April 11, 1968)

Before BROWN, Chief Judge, MOORE* and BELL, Circuit Judges PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

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*Of the Second Circuit, sitting by designation.

APPENDIX C

Opinion of the District Court

No. 3390 — In Admiralty

(Title Omitted)

(April 22, 1965)

FRANK B. ELLIS, District Judge.

This libel has been brought by the Alcoa Steamship Company, Inc., a corporation organized and existing under the laws of the State of New York, as owner of the S/S ALCOA CORSAIR, against respondent Charles Ferran & Company, Inc., a Louisiana Corporation domiciled in the City of New Orleans and engaged in the business as a ship repair contractor, and Ferran's liability underwriters, that is, respondents Glens-Falls Indemnity Company, a New York corporation, Underwriters at Lloyds, London, Andrew Weir Insurance Company, Inc., Fine Art and General Insurance Company, Ltd., National Provincial Insurance Company, Lets., Orion Insurance Company, Ltd., English and American Insurance Company, Let. "M", and Economic Insurance Company, Ltd.

The libel is for the recovery of one million dollars plus, resulting from the fire on the CORSAIR caused by the allegedly negligent repairs to the starboard boiler done by Ferran in an alleged breach of the implied warranties in the undertaking.

The case was tried in Court and on depositions on the question of liability vel non. After having carefully analyzed briefs and rebuttal briefs submitted by proctors for all parties, and, after an even more careful analysis of the evidence and exhibits submitted the Court now makes the following findings of fact and conclusions of law on the question of liability.

The S/S ALCOA CORSAIR was constructed, at the instance of the United States Maritime Commission, in Portland, Oregon, at the end of World War II. Subsequent negotiations transferred the ownership of the vessel, while under construction, to the Alcoa Steamship Company, Inc. She was completed, with some modifications, in 1946-47 and began her life in the admiralty.

The CORSAIR was a modified Victory Ship, designed for transportation of both cargo and passengers. She was four hundred and sixty five feet long by sixty five feet in beam and manned by its crew of some one hundred men. She served the shippers and residents of the Gulf States area from 1947 until October 1956, trading on a rum-and-romance run between Mobile, New Orleans, and a number of ports of the Carribean Sea.

The CORSAIR was driven by a single propeller which was powered by a steam turbine engine. Steam for the propulsion machinery and auxiliary equipment was supplied by two (port and starboard) high pressure boilers located in the fire room on the hold deck, at the

forward lower level of the engine spaces, which are located in the amidship area of the vessel.

The CORSAIR'S boilers are her initial power source, and their functioning at maximum efficiency is vital to the mechanical operation of the entire ship. To obtain the intense heat essential for generating steam, each boiler, operating on a combustion principle, burns a mixture of air and pre-heated oil.

A system of piping adjoining each boiler circulates black bunker oil through a heating system. When the fuel has reached a temperature of about 230 degrees F., the re-circulating valve is closed and the oil is held under pressure in a header or manifold pipe located on the upper outer casing of the boiler front. For the oil to move from the header into the interior or fire box of the boiler, where it is ignited, it must flow *through an upper coupling,* down through a dropline, and then through a lower coupling and lower valve into a burner which is inserted in a burner barrel, where it is atomized and sprayed into the arch of the fire box. On each boiler there are four identical burner positions, commonly referred to as registers. The boiler may be fired at one or more, or all, of the registers.

The mischievous device giving rise to this million dollar libel for damages is that coupling mentioned in italicized print in the preceeding paragraph.

To operate the boilers, air, driven by the forced air blower, is introduced into the fire box through the

space between the casings and then through the registers. The forced draft blower is a fan located several levels above the fire room but operated by a wheel valve from the fire room. It blows air into the opening between the inner and outer casing walls of the boiler beneath the floor plate level so that the air is forced under pressure through the ventilator blades of the registers between the casings. From the blades the air flows into the fire box.

On each boiler there are four registers, arbitrarily numbered from forward to aft one through four. The end registers, one and four, are situated at a higher level than are the middle registers, two and three. Each register is actually a circular housing for air ventilator blades. The register is bolted flush against the outer wall or casing of the boiler, and the fuel carrying burner barrel, to which the dropline is connected, passes through its center. In this way, the two combustible elements, oil and air, are introduced into the fire box at the same point.

Ignition of the oil-air mixture is effected by the use of a simple torch, pushed through the peephole located on the face of the register, just above the burner barrel assembly. This ignition phase of operation follows the clearing phase in which the forced draft blower is first used, before insertion of the torch, to expel from the fire box any residual fumes which might have accumulated there.

It is well to note, at this juncture, that the position of the droplines in relation to their respective registers

is such that it is mechanically impossible to remove the register without removing the dropline, removal of which is effected by disconnecting both the upper and lower fittings.

The interior of the boilers, that is, the fire box, has walls and flooring of firebrick. On the inner front wall there are four arches made of tile, surrounding the aperture where each register sits. Periodic maintenance repair of this brick and tile work is necessary for efficient steam generation.

Because of the pre-heated oil used under pressure, and because of the steam produced, great care is required at all stages of working with the boilers: at construction, at operation and certainly at every repair.

The constant maintenance which a ship requires is best handled when one reliable ship repairer does all or nearly all of the work. With this in mind, Alcoa came to an informal understanding with Charles Ferran & Company, Inc., that the latter should handle the repairs to the CORSAIR when she was in her base port of New Orleans. Even during the building of the CORSAIR, the then vice-president and general manager of Ferran, A. N. Kreihs, had gone to the construction site at Portland, Oregon, in order to familiarize himself with her characteristics. This general understanding bound neither party to perform; at any time Alcoa could have employed another New Orleans repairer, and Ferran was free to refuse to work on the CORSAIR.

Rather than a general contract, there was a series of individual contracts whereby Ferran worked on a cost-plus or time-and-material basis. And it was on this basis that Ferran had made from time to time virtually all the repairs to the CORSAIR, including necessary boiler work, from the time she went into service until the repair of the fire damage, which is the subject of this litigation.

There were no other terms in these individual contracts, with the exception of a "Red-Letter" clause. In order that proper attention may be focused on this clause, it is here quoted in full:

> "We contract only upon the following terms, applicable to every contract; in the case of a vessel we have a lien upon the vessel for our bills; all time contracts are subject; without responsibility on our part, to delay in case of strike, labor difficulties, fire or causes beyond our control; or liability in case of defective workmanship or material is limited strictly to the proper replacement thereof.
>
> "Furthermore, we undertake to perform work on vessels and provide berth, wharfage, towage and other services and facilities only upon condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract, tort or otherwise, to its owners, charterers or underwriters for any injury to such vessel, its cargo, equipment or movable stores, or for any consequences thereof, unless such

injury is caused by our negligence or the negligence of our employees and in no event shall our aggregate liability to all such parties in interest for damage sustained by them, as a result of such injury, exceed the sum of $300,000.00.

"In connection with the accident and/or indemnity and/or insurance clauses, if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligation to take out or maintain insurance beyond the liabilities or the obligations to insure imposed upon us by law."

Alcoa asserts without serious contestation, and the court finds, that in a typical instance an individual contract was made and performed in the following manner. Initially, work was assigned to Ferran by Alcoa, either by telephoning work items in broad outline or by sending brief, undetailed memoranda. Upon arrival of the vessel, Louis Tavan, the Ferran superintendent in charge of work on Alcoa ships, boarded the ship, inspected the items to be repaired, and thereafter prepared rough specifications for each of these items. Upon completion of the work, Tavan rewrote the specifications to conform with actual work, and these "rewrites", with prices itemized, were then sent to Alcoa. If it agreed to the prices, Alcoa then typed Ferran's rewritten specifications on an Alcoa job order form and sent this to Ferran. Shortly

after the ship in question had sailed, Ferran mailed Alcoa an invoice listing the cost of each item.

Alcoa admits that on October 31st, twenty-six days following the fire, an invoice was transmitted covering the work in question which embraced the red-letter clause, Ferran exhibit #13. Apparently subsequent billings on numerous Alcoa vessels contained the red-letter clause. In addition to exhibit #13 Ferran has proved that prior billings contained the clause, exhibits Ferran #7 through #12. It is true that the applicability of this clause has never been tested since no loss has ever occurred which exceeded the $300,000 limitation.

Ferran counters, and this court agrees, that both parties were fully aware of the practice in the trade, and further that Alcoa made no objection, and no one connected with Alcoa did anything to indicate their intention to exclude the red-letter clause in this particular case or any other until the New York contract of October 8, 1956. Under the usages of the trade, the exhibits and the evidence, the clause was in force and effect in this case. The applicability of the clause is further borne out by the witnesses, the most significant of which is Alcoa's Superintendent of Engineering, Lyndon L. Watts, who represented Alcoa and negotiated repair contracts with Ferran, and who testified that he knew that the red-letter clause was on the invoices and had seen it several times prior to 1956. Apparently Watts had read the clause on this and several other repair contractors' invoices prior

to October of 1956 and was familiar with the fact that it had been used in the trade.

This Court further agrees with Ferran that Alcoa's Port Captain, R. W. Davis, admitted that he probably saw the red-letter clause but did not pay much attention to it until the time of the incident in question.

The Court recognizes, Alcoa Exhibit #10, that a contract was entered into on October 8, 1956, in New York, to repair damage to the burned out S/S ALCOA CORSAIR. This contract obligated Ferran to carry comprehensive public liability insurance with limits of $500,000/$1,000,000 for bodily injury and $50,000/$100,000 for property damage. The red-letter clause was not included into this specific contract, not even by reference.

Alcoa exhibit #10 marks the first time, as far as the record reflects, that Alcoa sought, in writing, to get out from under the limitation expressed by the red-letter clause.

Article 13, mandatory insurance coverage, and Article 14, the hold harmless clause, appeared to the court as an obvious effort to circumvent the limitation of liability which controlled prior relationships between Alcoa and its repairman, Ferran.

The Court finds, as a matter of fact, that the red-letter clause was common in the trade and had been used by Ferran on many prior occasions in billing Alcoa for repair work and had been used on other

Alcoa repair jobs subsequent to the accident. Under all these facts this Court is compelled to find that the limitation of the red-letter clause was in effect when the repair work on the job at issue was done.

Turning now to the main body of facts, the CORSAIR sailed from Mobile, Alabama, and arrived in New Orleans in the early morning of October 4, 1956. At some time before the CORSAIR docked at the Bienville Street Wharf, O. W. Davis, Alcoa's local port captain, notified Ferran of certain general repairs which the ship needed. One of the repairs requested was the re-bricking of the floor of the fire box of the starboard boiler. The CORSAIR arrived in New Orleans at about 6:30 A.M. on Thursday, October 4, 1956, with both its port and starboard boilers in use and working well.

After arrival, the fires of the starboard boiler were turned off to permit the fire box to cool for the brickwork. The port boiler thereafter supplied the ship's power. Ferran's superintendent in charge, Louis Tavan, inspected the items to be repaired and wrote the preliminary specifications, which were actually an itemization and/or extension of Captain Davis' orders.

No work was done on the starboard boiler that day. Ferran, however, was engaged in making other repairs aboard ship and in assisting the U. S. Coast Guard and the American Bureau of Shipping on their inspection of the CORSAIR. At the conclusion of their inspection the following day, both agencies found the ship's gear, equipment, and fittings, including its fire-fighting system, in good order.

Shortly after 8:00 A.M. on the morning of Friday, October 5, 1956, Ferran's labor gang boarded the CORSAIR to begin the brickwork in the fire box of the starboard boiler, after the Ferran employees had opened the boiler. Although the work was under the general supervision of Mr. Tavan, Hubert W. Hambrice, one of Ferran's labor foremen, was in immediate charge of the operation from 8:00 A.M. to 5:00 P.M. On this job, Hambrice used three bricklayers and several laborers.

The job Ferran had to do consisted of these steps: opening up the boiler, removing the old bricks and debris from the fire box, passing this material up and off the ship, lowering the new brick and tile from the dock down into the fire room and into the boiler's fire box, laying the bricks and tiling the arches, and then finally closing up and checking the boiler. As Alcoa had simply instructed Ferran to rebrick the starboard boiler, Ferran was free to perform the job in any reasonable way it saw fit.

Ferran went about the job in the following fashion: it first opened the access door, then to facilitate the removal of the old brick and debris, to provide ventilation in the fire box, and to make it possible to tile the arches of the fire box, Ferran removed two of the registers.

Alcoa contends that the two lower registers, numbered two and three, were removed. Ferran contends the #1 dropline was connected at the top, disconnected at the bottom, and turned to one side. The tops of the #2, #3, and #4 droplines were connected and the bottoms

disconnected and that the only opening in the boiler was the access door. The Court finds as a matter of fact that the register in question, #3, had been removed. This controversy will be further discussed in subsequent paragraphs.

To remove the registers it was necessary to remove the droplines at these registers by disconnecting their upper and lower fittings. The droplines at #2 and #3 registers were removed and placed on the burner bench.

The bricklayers entered the fire box and began removing the old brick and debris. This was passed out to the laborers, who hoisted it from the hold deck to the second deck, where it was moved through the door on the starboard side of the machinery spaces. From there it was passed through a fuel-oil loading compartment and then through a wing port on the starboard skin of the vessel and onto the dock.

The new brick and tile were brought to the bricklayers in the fire box along the same route. The bricklayers had about 1,000 bricks to lay and the four arches to tile. Consequently, the work was not finished at 5:00 P.M.

During the regular work day from 8:00 A.M. to 5:00 P.M. a fireman from the crew of the CORSAIR was on duty in the fire room maintaining steam on the port boiler and checking the operation of other machinery then in operation. The ship's engineering officers, not

on leave, were working about the vessel under the supervision of the chief engineer, Mr. Lemon.

At 5:00 P.M. there was a change in both the engineering personnel of Alcoa and in some of the boiler workers of Ferran. The ship's engineering officers were off duty, but the Chief Engineer left Second Engineer Floyd L. Johnson aboard, since there was still work being performed on the engine room pumps and on the starboard boiler.

Plumber-Machinist Lee A. Smith was standing the watch as fireman-watertender until midnight. Night Relief Engineer Kent assumed the watch in the machinery spaces until midnight. Johnson, Smith and Kent were the only Alcoa personnel in the machinery spaces from 5:00 P.M. to midnight.

No Alcoa employee had anything whatsoever to do with any of the brickwork, or with disassembling the droplines and removing the registers, or with replacing the registers and reassembling the droplines. Ferran employees, and only they, performed those steps as necessary steps in performance of their rebricking work.

As for personnel in Ferran's gang working on the boiler. Foreman Hambrice was relieved at 5:00 P.M. by Labor Foreman Marchetta, who assumed responsibility for the completion of the work. The labor force was relieved by a new gang, but the bricklayers stayed on overtime. In addition to this work party, Ferran had General Superintendent Tavan and an undeter-

mined number of machinists and skilled laborers working on the engine room pumps.

At about 9:30 P.M. the brickwork on the starboard boiler was finished and the bricklayers left. The Ferran workers replaced the registers and began to attach the droplines. At the point where the #3 dropline was to be reconnected at its upper end, there was a male fitting (introduced into evidence as Alcoa-8), whose threads were worn, and/or may have been stripped or in a cross-threaded state.

This fitting, the source of much mischief, at this time, on the basis of its worn condition alone, was not proper for further safe use.

Nevertheless, one or more of the Ferran employees re-engaged the female fitting of the #3 dropline with this improper male fitting.

The identity of the Ferran employee or employees who made this reconnection is not absolutely clear, as there may have been someone other than Marchetta who had put the fittings together hand tight before Marchetta used a wrench to tighten the coupling.

The Court finds as a matter of fact that what is absolutely clear is that Ferran employees did reconnect the upper coupling of the #3 dropline with a worn and consequently improper fitting. The Court also finds, as a matter of fact, that the fitting in question was made of bronze and painted silver in lieu of steel which made a stronger connection.

Ferran's General Superintendent Tavan stated that the job of closing up a boiler, i. e., replacing and re-engaging registers, droplines and fittings and checking, is the work of a qualified boiler maker of machines. Marchetta, who did close up the boiler, was not qualified in either capacity.

Mr. Tavan stated that is was the duty of Ferran to check any dropline fittings it had disconnected before re-engaging them. If defects were found, they were to be reported to the ship's personnel, or were to be replaced properly with non-defective fittings.

As to checking the fitting by touch, Marchetta, who tightened the fitting, stated that all he did was turn the female fitting on the male with two half-turns of a wrench.

A summary inspection of the brickwork was made by Alcoa's Second Engineer Johnson after Marchetta and Tavan advised that the job was finished. Before leaving the engine room, Johnson wrote on the blackboard instructions for the firemen coming on at midnight and at 4:00 A.M. the next morning.

These orders called for lighting off the burners in the starboard boiler in rotation in order to facilitate the drying of the brickwork. The Ferran laborers finished cleaning up the area and removing their tools, then they left the ship.

Thereafter no one touched the starboard boiler until 2:00 A.M. the following day.

From midnight on, Relief Engineer Moses, an elderly but qualified chief engineer assigned to the CORSAIR by the Engineers Union, was standing the engineer's watch. Francis F. Gomez relieved Lee A. Smith as fireman-watertender.

At 2:00 A.M. on October 6, Gomez, pursuant to Johnson's instructions, began lighting off the burners of the starboard boiler to dry the brickwork. This was the first time that the starboard boiler had been touched by anyone since Ferran's Marchetta closed it up. Gomez was supposed to burn one fire for 10 to 15 minutes, turn it off, and, after a lapse of 10 or 15 minutes, fire another burner for a 10 to 15 minute period, continuing the process until he went off duty at 4:00 A.M.

Gomez, however, lit off only two burners between 2:00 A.M. and 4:00 A.M. and left each burning for a 10 to 15 minute period. One of the two burners he said he used was the burner on the #3 register. He experienced no difficulty.

Shortly before 4:00 A.M. on October 6, Thomas C. Deale, relieved Gomez as fireman. When the watch was exchanged, Deale found all burners on the starboard boiler off, and Gomez made only routine reports to him. At about 4:20 A.M. Deale made preparations to continue the rotation of burners in the registers of the starboard boiler.

He inserted a burner in the burner barrel of the #3 register and prepared to light that one off. By circu-

lating the oil under pressure, Deale raised its temperature to about 230 degrees F., the proper level for lighting off.

At this point the evidence conflicts as to whether or not Deale turned on the forced draft blower to the starboard boiler to blow out any fumes which might be lingering in the fire box. In any event, Deale turned off the fuel oil circulating line and lit his torch.

He then opened the upper dropline valve at the #3 register; with his left hand he inserted the torch through the register's peephole, and with his right hand he began opening the lower valve on the register's dropline.

The critical moment has now arrived and Deale testifies as follows:

> "* * * and after circulating my oil for 10 or 15 minutes to get it up to the pressure which I would say we burn it at, then I put my fan on and brought my air up to better than three inches or three inches and circulated the boiler good to make sure that it is no fumes in the boiler. Then I slowed my fan back down, because with a high fan you can't light that boiler with a torch. It would blow it out every time you put it in there. So I slowed it back down, and * * * which I am left handed * * * I opened the top valve to the * * coming off of your burner * * and I reached over and shut may circulating line off, and then when I reached to open

the valve to the burner, which I would say I opened it a turn and a half, well, that is when the hot oil hit me on my face and arms, which I jumped * * * and bringing the torch with me * * * that is when the boiler ignited and it just was a mass of flames, that was all." Deposition, page 19.

"I closed it. Then I had my peephole open, which I stuck my torch into the boiler, and with my right hand I opened the valve about one turn and a half, and that is when the oil hit me from up above, side of my face (indicating.)" Deposition, page 38.

"* * * you close it, then you just stick your torch right into the boiler and open it, and that is when the oil hit me, like I said, on the side down on this arm." Deposition, page 42.

The clarity of this testimony is indicative that the procedure followed by this witness in firing the #3 register of the starboard boiler has been clear, concise, unequivocal and impressive to the Court.

When Deale inserted his torch into the peephole nothing at that moment happened as it would have had there been an accumulation of inflammable vapor behind the register.

As he opened the valve and pressure developed on the line the male and female units, Alcoa 7 and 8, parted company spraying oil at random.

Deale was sprayed and partially covered with intensely hot, 230 degrees F., fuel oil which struck him on the left side of his head and on the back of his left upper arm. Scalded with boiling oil, Deale instinctively jumped back, in his reflexive recoil pulling the torch from the peephole of the boiler.

The torch instantaneously ignited the spray of oil, and an intense blaze was set off in the fire room. The very heart of the flames separated Deale from a quick shut-off valve on the fuel oil header located forward of the #1 register which he tried to reach.

In order to get to the quick shut-off valve Deale would have had to return through the fire area. It appears that the quick shut-off valve was located at the forward end of the boiler, in a *cul-de-sac*. Unwilling to risk entrapment in an attempt to close the quick shut-off valve, Deale ran to the after end of the engine room with the intent of entering the CO_2 room and going through it to reach the remote controls for the fuel oil system.

Unfortunately the CO_2 room was locked and Deale was thus prevented from reaching the CO_2 room. By deposition at page 61 he states:

"Q. Suppose you could have gotten through the CO_2 room. Would that have helped matters any, in your estimation?
"A. You could have stopped the fire.
"Q. How?
"A. By shutting off the settling valve.

"Q. And what would the effect have been?
"A. It would have stopped the flow of oil.
"Q. And, of course, you would have done that had you gotten into that room?
"A. That was in my mind to do."

The now raging fire filled the engine spaces with that mass of flame and black smoke that only an oil fire can produce. The heat was intense. Night Relief Engineer Moses, overcome by the smoke and heat, died of asphyxiation, his body later being found on the generator flat one level above the fire room.

Shortly after the blaze began a fire bell was sounded by someone unknown. The alarm wakened the skeleton crew of 20 aboard the vessel and they awoke to find their living quarters already engulfed in dense black smoke.

At the second deck, the flames poured out of the side port and out of the engine-spaces. Both doors were open. On each door there was a brass plate with the inscription reading: "KEEP THESE DOORS CLOSED AT ALL TIMES."

The ship's personnel, in their movements about the upper decks, were confronted with severe heat and were blocked by walls of dense smoke. Two men knew the cause of the fire; one was dead and the other badly burned and presumably in a state of shock.

The fire raged on.

The next person to gain knowledge of the fire was night relief mate, Mr. Graham. Mr. Graham testified quite candidly that he did not know the location of the control station, another apparatus for the fuel oil system. As expeditiously as possible, Graham went below in an attempt to shut down the fuel supply. The lighting below decks was insufficient and Mr. Graham found himself "very much lost".

The New Orleans Fire Department was summoned by a watchman at the gangway of the CORSAIR, and fire engines arrived at about the same time as Chief Engineer Lemon, that is, about 4:40 A.M.

It is not clear to the Court whether Chief Lemon first tried to reach the control station or the CO_2 room. It is borne out by the testimony, however, that he did make one unsuccessful attempt to reach the control station and one successful attempt. He successfully cut off the supply of boiler fuel feeding the fire at about 5:00 A.M.

His attempt to reach the control station had been abortive. He testified on two occasions, once before the Coast Guard and once on deposition, that he made an attempt to reach the controls system just aft of the engine room door, port side. Whether Mr. Lemon was confused by the urgency of the situation, or the holocaust that confronted him, is not clear, however it is clearly demonstrated that the control station was located on the starboard side of the vessel and not the port side.

Compounding the inaccessibility of the controls, the Court notes that Mr. Smith, the fireman on watch during the day, testified that the control station was on the port side of the vessel; Mr. Kent, the night relief engineer from 4:00 P.M. to midnight testified that he was not familiar with the location of the control station; Mr. Graham, the night relief mate on watch at the time of the fire, did not know the location of the station on the starboard side of the second deck, amidships, and more important, neither did Mr. Deale who was on watch at the boilers. Mr. Deale testified as follows:

"Q. And if the CO_2 room had not been locked, would you have been able to start that system?
"A. No, I wouldn't have tried to start that system while I was down there.
"Q. Why?
"A. You couldn't start it from there.
"Q. Where do you start it from?
"A. Well, I presume on there it was up on the top deck, on the passenger ship. I just don't know exactly where the main pulling valve was to them or not, to set them bottles off, but my idea was to go through the CO_2 room as an escape."
(Deposition pages 53-54.)

The control station is to be distinguished from the CO_2 room in that the CO_2 room is located in the hold aft of the starboard machinery spaces. If the CO_2 room had not been locked and the ventilating fans

off, the fire could have been brought under early control and damage minimized. In this light Mr. Deale testified as follows:

"Q. Suppose you could have gotten through the CO_2 room. Would that have helped matters any, in your estimation?
"A. You could have stopped the fire.
"Q. How?
"A. By shutting off the settling valve.
"Q. And what would the effect have been?
"A. It would have stopped the flow of oil.
"Q. And, of course, you would have done that had you gotten into that room?
"A. That was in my mind to."
(Deposition, page 61.)

To make the CORSAIR case even more difficult to accept, it appears from Captain Davis' testimony that had the CO_2 been activated, it would not have been effective in extinguishing the fire. The engine room of the CORSAIR was equipped with a ventilating system consisting of certain fans which would move approximately 56,000 cubic feet of air per minute in and out of the engine room. There was no remote control for this ventilating system and the ventilating fans were accordingly on after the fire was extinguished.

Therefore, even if the CO_2 system had been activated, the CO_2 would have been withdrawn from the engine room as fast as it was put in. Hence we have a system designed to fight fire consisting of carbon

dioxide which would have been totally ineffective because the fire fighting chemical would have been pulled out of the area of the fire by ventilating fans as fast as it was discharged from the fire fighting system.

So even if the CO_2 system had been activated the lack of automatic stops for the ventilating system would have prevented the carbon dioxide from serving its purpose. It would thus appear that the CORSAIR, in this respect, was unseaworthy by naval architectural design and standards.

After Chief Engineer Lemon reached the remote fuel oil controls the fire was quickly extinguished, its source cut off. It was not until 6:30 A.M. that the machinery spaces had cooled sufficiently to allow entry.

At that time Chief Engineer Lemon and Port Captain Davis went below to search for the missing Night Relief Engineer, Mr. Moses. As stated before, his corpse lay on the generator flat.

While below, both Davis and Lemon found the dropline at the #3 register separated at its upper coupling.

The next group to enter the engine room consisted of Benjamin J. Morrison, then employed by Ferran, Louis Tavan, Ferran's superintendent, and Captain Davis. They went down about 9:00 A.M., Saturday, to examine the damage in connection with the repairs to be made. Morrison held a license as a marine engineer and had worked for many years in the oil field and

ship repair business. He was naturally curious about possible causes of the fire.

In his examination, Mr. Morrison testifies that he found that the valve of the forced draft blower was in the closed position. Not only did he check the position of the valve wheel, but he asserts that he checked the thread stem at the forced draft blower itself and found that it also was closed.

Although he was not with the Morrison inspection group, Chief Leman found the valve of the forced draft blower open and in operating position on his inspection after the fire.

Whether or not Deale turned on the forced draft blower prior to insertion of the lighter to ignite the third register is a subject of conflicting testimony. Nevertheless, the Court finds that Deale did turn on the blower before seeking to ignite the register. Disregarding the human testimony, the inescapable physical facts indicate that *no* explosion occurred when the torch was first inserted into the peephole. Had there been residual oil and vapor behind the register an explosion would probably have occurred within the register and boiler if the blower had not been in operation.

The clearest and most reasonable construction of the testimony is that the critical valve was parted simultaneously or just prior to the fire. This could only have occurred as a result of a defective connection or as a result of an explosion due to combustion of residual

oil and fumes which Deale had failed to solve by proper use of the blowers.

The Court has discarded the premise that combustion within the register caused fire because it is felt that an entirely different type of damage would have resulted, that is, the register would have been blown off, there would have been inside damage to the register and boiler, whereas it is an accepted fact that there was no damage except the dislocation of the critical valve.

The face of the register was scorched and the intense heat left its mark, but there was no serious mechanical damage, all leading to the inescapable conclusion that this fire had its inception when the male and female components of the valve parted, spraying boiling oil over the area and onto the face and neck of the man who stood at the register.

Thus it is that we may discard the testimony of the several witnesses and decide this matter on the physical facts as heretofore decided, that the blowers were turned on before ignition took place.

With evidence so hopelessly in conflict, the Court notes that the photographic evidence of the scene of the calamity taken shortly after the fire shows the plate housing the #3 register intact, but the dropline parted at the upper coupling. Strange how a flareback would not damage the outside casing or register housing but still part the upper coupling.

On October 8, 1956, Alcoa and Ferran entered into a general written contract (the only written contract ever made between the parties) to repair the fire damage on the CORSAIR. Payment was again to be on a time-and-materials basis. This written contract specifically called for Ferran to carry insurance in the amount of one million dollars for the fire-damage repairs, as previously discussed.

Alcoa re-engaged the services of Ferran at this point because Ferran was most familiar with the CORSAIR and it was expedient that the CORSAIR be returned to service as soon as possible.

First of all, there can no longer be any doubt that a contract to repair a vessel is a maritime contract. Such has long been the law, The General Smith, 4 Wheat. 438, 17 U.S. 438, 4 L.Ed. 609; North Pacific Steamship Company v. Hall Brothers Company, 249 U.S. 119, 31 S.Ct. 221, 63 L.Ed. 510, and accordingly federal maritime law governs the construction of the agreement, even if consensual, Booth Steamship Company v. Meier & Oelhaf Company, 262 F.2d 310 (2 Cir. 1958).

It is also old hat that when a shipowner and an expert independent contractor enter into a service agreement, the shipowner is entitled to indemnification for all damages sustained as a result of the contractor's breach of its warranty of workmanlike service, all as brought out in the Longshoreman versus Shipowner versus Stevedore cases, Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 350 U.S. 124, 76

S.Ct. 232, 100 L.Ed. 133; Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491; Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413.

It is not a gigantic step forward to hold the "warranty of workmanlike service that is comparable to the manufacturer's warranty of the soundness of its manufactured product", Ryan, supra, 350 U.S. at pages 133-134, 76 S.Ct. at page 237, to a ship repairman. Such a step has been made on several occasions. Booth Steamship Company v. Meier & Oelhaf Company, 262 F.2d 310 (2 Cir. 1958); Hershey Chocolate Corporation v. The S.S. Robert Luckenbach, 184 F. Supp. 134 (D.Ore. 1960), affirmed 295 F. 2d 619 (9 Cir. 1961).

In the latter case, Judge Kilkenny, considering the liability of a ship repairer, Albina Engine & Machine Works, stated:

> "Albina argues that these cases should be distinguished in that they involve personal injuries to a stevedore, rather than property damage to a vessel. I am unable to distinguish the logic or the soundness of the reasoning in the stevedoring cases from what should be the logic and the soundness of the reasoning in arriving at a proper conclusion in this case. The decisions in the stevedore cases control. I see no distinction between liability by way of indemnity and liability by way of direct damage or compensation." Hershey, supra, 184 F. Supp. at pp. 140-141.

Thus the court is presented with a register, #3 starboard, which was not prone to spraying boiling oil about the engine room prior to October 6, 1956, such register being removed by an expert ship repair contractor in re-bricking the starboard boiler on October 4th and 5th, being re-assembled and after being used once, spraying boiling oil about the engine room and onto the ship's personnel from the upper dropline coupling.

The Court finds that Ferran's negligent, assembling of the upper coupling of the dropline on the #3 register was, in fact, a breach of its warranty of workmanlike service and liability is thus imposed under the authorities cited heretofore.

If the register had not been removed, as asserted by Ferran, there is positive evidence to the effect that Marchetta sought to tighten the defective coupling in question with a hand wrench. The Court concludes that Ferran is liable for its negligence in violating the warranty of workmanlike service as the proximate cause of this accident.

Thus far, this Court has cast Ferran both factually and legally in liability to Alcoa for the damage resulting from its breach of warranty. Now the scorching, searing question is whether an award should or should not be reduced due to unseaworthiness of the vessel, if any, and acts of negligence, if any, which existed before or transpired after the inception of the fire.

First of all, the Court notes that the fire could have been extinguished in a matter of seconds had the quick shut-off valve been located in a more accessible area. The two boilers of the CORSAIR were located at the forward end of the engine room space, and almost immediately forward of the boiler was a thwartship bulkhead which had no openings in it. Crew members working at the boilers and suddenly confronted with an emergency situation had to make their exits from the after end of the engine room. Thus in the event of a fuel oil fire in the machinery spaces, the one piece of safety equipment to cut the source of oil feeding the fire is inaccessible.

This piece of safety equipment was inaccessible by the vessel's very design. The Court finds a patent case of unseaworthiness when a piece of safety equipment is rendered inaccessible by the very catastrophe which it was designed to prevent.

Secondly, a locked CO_2 room is as good as no CO_2 room at all. This elementary point is too obvious to cry out for an elaborate dissertation on the functions of CO_2 and the purposes of the room which stores it.

Inasmuch as the CO_2 was not activated, the Court will not again stress the fact that a ventilating system capable of removing 56,000 cubic feet of air per minute would have removed the CO_2 as fast as it was put into the engine room.

Third, the court should point out that, compounding the negligence of locking the CO_2 room, Deale could

have stopped the fire by shutting the "settling valve" the effect of which would have been to stop the flow of oil, for, in his own words, "that was in my mind to do".

Fourth, the Court finds that those members of the crew on watch at the time, officer and rank-and-file, did not know the location of the control station for the machinery spaces which were located on the starboard side, second deck, amidships.

Fifth, doors leading to the engine room were left wide open, even though they were supposed to be "closed at all times". Black, dense smoke from the fire spewed into the crew's quarters further compounding the pandemonium that ensued after the fire bell was sounded and making things quite difficult for officers and men who did not know the location of the control station for the machinery spaces. Indubitably, a raging fire that might have been stopped at a relatively early stage escalated and raged on, fed by oil until Chief Engineer Lemon finally turned the valves off from the remote control station some 40 minutes later.

This Court finds that these acts of negligence and unseaworthiness warrant the application of the doctrine of "Avoidable Consequences".

In legal support of the doctrine, see Southport Transit Co. v. Avondale Marine Ways, 234 F.2d 947, 951-954 (5 Cir. 1956) and extensive authorities cited therein. According to that theory, "a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure

on his part to use reasonable efforts to avoid or prevent them." 234 F.2d at 951-952. Therefore the question arises whether, and to what extent, if any, the losses sustained could have been averted or diminished by the performance of any reasonable efforts or responsibilities imputable to Alcoa. In other words, after the initial damages had resulted from the acts of respondent Ferran, were any of the subsequent damages attributable to libelant Alcoa's own negligence or the unseaworthiness of the vessel. The Court feels so, for much of the damage resulted from Alcoa's failure to have reasonable fire fighting apparatus available and usable, as well as its failure to perform certain duties which would have curtailed the heavy losses that occurred.

In conclusion the Court holds:

1) That the Red-Letter clause is applicable to and binding upon libelant Alcoa and respondent Ferran;

2) Ferran's negligence was the proximate cause of the start of the fire;

3) The negligent acts of Alcoa and unseaworthy condition of the CORSAIR as specified in this opinion must be construed to mitigate the damages which occurred.

As stipulated by counsel, this Court is not called upon to determine the quantum nor to apportion the damages which ensued as a result of the initial fire and those damages which resulted from the escalation of

the fire and smoke that could at some point have been avoided had the vessel been seaworthy and Alcoa free of negligence.

APPENDIX D

Opinion of the District Court on Rehearing

No. 3390 — In Admiralty

(Title Omitted)

(March 2, 1966)

FRANK B. ELLIS, District Judge.

On October 6, 1956, a devastating oil-fed blaze aboard the SS ALCOA CORSAIR gutted a major portion of the vessel's engine spaces, killed one man and left another badly burned. The owner of the vessel, Alcoa Steamship Company, Inc. (Alcoa) then instituted this million dollar libel for damages against the ship's repairers, Charles Ferran & Company, Inc. (Ferran), and against Ferran's insurers. Ferran had just a few hours earlier completed rebricking the starboard boiler. The parties, reserving the determination of the quantum of damages for a later date, tried the questions of liability to the Court without a jury, and on April 22, 1965, this court filed written findings of fact and conclusions of law. Alcoa Steamship Company, Inc. v. Charles Fer-

ran & Company, Inc., 242 F.Supp. 962-975 (E.D.La.1965). In brief this Court held.

1) That the "Red Letter" clause uniformly inserted in all prior Ferran-Alcoa repair contracts limiting Ferran's liability *vis-a-vis* Alcoa to $300,000.00 was binding and enforceable;

2) That Ferran's negligence in improperly re-connecting the dropline which supplied pre-heated oil to the starboard boiler through the #3 burner register was the proximate cause of the fire's inception; and

3) That the negligent acts of Alcoa and the unseaworthy condition of the CORSAIR warrant application of the "avoidable consequences" doctrine and an ultimate apportionment of the total damages.

None of the parties being satisfied, motions for rehearing and for supplemental and amended findings of fact and conclusions of law were filed, followed by oral argument.

a) *Prior findings of fact.*

At the outset of this consideration, a skeleton restatement of the original fact findings is appropriate. The CORSAIR is an oil burning, steam-driven, single screw, modified Victory Ship constructed in 1947. Its oil is preheated to 230 degrees Fahrenheit and piped through droplines into the four burner registers on each of the

two boilers where the oil is then mixed with air and ignited to heat the boiler, produce steam and turn the propellor. Ferran removed the #3 register on the starboard boiler to rebrick the inside and, in re-attaching the dropline to the register after finishing the work inside the boiler, one of Ferran's employees re-engaged the female fitting on the #3 dropline with the corresponding male fitting "whose threads were worn, and/or may have been stripped or in a cross-threaded state." 242 F.Supp. at 968. This was shortly after 9:30 P.M. the night of October 5th.

At about 4:35 A.M. the morning of October 6th, the CORSAIR'S Fireman, Thomas C. Deale, after having re-circulated the oil to build up pressure and raise its temperature to 230 degrees, opened the valve above the defective coupling with his one hand and was sprayed with superheated oil under pressure. Instinctively falling backwards, the lighting torch which he had been holding to the register's peephole ignited the uncontrolled flow of oil and sparked the holocaust that followed. The rapidly expanding inferno separated Deale from the "quick shut-off valve" which, had it been reached and closed, would have minimized the damages. And Deale's heroic efforts to reach the settling valve, a remote fuel oil system control, were thwarted by a locked door on the CO_2 room through which he would have had to pass. No one else aboard the ship at the time knew how or where to cut off, by use of remote controls, the flow of oil that continued to feed the fire. The CORSAIR'S Chief Engineer, Mr. Lemon, was summoned, but it was not until about 5 A.M. that he finally

succeeded in his efforts to cut off the flow of fuel oil feeding the fire.

b) *Ferran's negligence.*

We remain unswayed by Ferran's continued arguments that the blaze's beginning did not result from negligence attributable to Ferran. As set forth at length in our original opinion, the physical facts, supported by testimony from some of the witnesses, leads "to the inescapable conclusion that this fire had its inception when the male and female components of the valve parted," the same components that Ferran had a few hours earlier re-connected.[1]

c) *Applicability of "Red Letter" clause.*

Equally unpersuasive is Alcoa's argument, incorporated only by reference in its original memorandum on rehearing, that the "Red Letter" clause, purporting to limit Ferran's liability to $300,000.00, was not a part of the contract ostensibly completed just prior to the fire. The common practice between these parties, not their explicit words prior to the fire, belied the true relationship.

> "Usages and customs may be proved * * * to affect the contractual relations of the parties by adding a provision to the contract that the words of the parties can scarcely be said to have expressed." 3 Corbin on Contracts, § 556, p. 240 (1960 Ed.)

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[1]See especially, 242 F. Supp. at 972.

The Ferran-Alcoa repair contract relationship is explained in 242 F.Supp. at 965-966. We therefore reaffirm the findings that the "Red Letter" clause formed part of the contract at issue.

d) *Validity of "Red Letter" clause.*

The next step, not fully developed in the original opinion, is whether the "Red Letter" clause, limiting Ferran's liability, stands invalid as against public policy. This mutually agreed upon clause purports to relieve Ferran from liability for damages in excess of $300,000.00, caused by Ferran's own negligence or breach of contract.[2] In Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955) the negligent towage by those operating the Tug Cairo caused the oil barge Bisso to collide with a bridge pier and sink. The Tug owners had exacted a "release-from-liability-clause" from the barge interests as part of the towage contract. In effect, the release clause purported to relieve the tug owners from *all* liability for their own negligence. The Supreme Court invalidated the release clause for two main reasons:

> "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. at 91, 75 S.Ct. at 632.

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[2]The "Red Letter" clause is set forth in full at 242 F. Supp. 965.

Briefly stated, the Court in Bisso held "that tow and tug may not by agreement relieve the tug of liability for damage to the tow caused by the tug's negligence."[3]

Alcoa here attempts to analogize its position with the Bisso holding by parodying "that ship and repairer may not by agreement relieve the repairman of liability for damage to the ship caused by the repairman's negligence." The whole tenor of the majority opinion in Bisso, however, as well as the dissenters' analysis of the majority holding, fails to adequately support Alcoa's argument. Significant factual differences exist. First, while relief from all liability for negligence might not discourage negligence, potential responsibility for $300,000.00 in damages would have the effect of discouraging negligence. Under the "Red Letter" clause Ferran remains responsible for a substantial amount of damages. Secondly, it is the general rule of contracts that "with certain exceptions the courts see no harm in express agreements limiting the damages to be recovered for breach of contract."[4] The "exceptions" referred to involve, generally, contracts of the adhesion-type wherein the bargaining power of one party is extremely restricted to the point where countenancing the limitation becomes unconscionable. When a limitation does not result from inequality of bargaining power, the courts prefer to let parties lie on the bed they make.[5]

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[3]349 U.S. at 98, 75 S.Ct. at 637; Mr. Justice Frankfurter, joined by Mr. Justice Reed and Mr. Justice Burton, dissenting.
[4]5 Corbin on Contracts, § 1068, p. 386 (1960 Ed.)
[5]Ibid.

In *Bisso* the Supreme Court ruled that contracts releasing a tug or its owners from all liability are, "based on public policy," invalid,[6] and emphasized the powerful bargaining position enjoyed by tugs when dealing with barge owners.[7] Similarly leashed are common carriers,[8] employers,[9] and manufacturers or dealers in a position to utilize adhesion contracts.[10] In sharp contradistinction stands the situation where the bargaining power of the parties approximates equality.[11] Alcoa has not proven that Ferran held a severely imbalanced upper hand.[12] Nor was evidence produced to show that all ship repairers', or all Ferran company contracts with all vessel owners included a $300,000.00 limitation clause. In fact, the Ferran-Alcoa contract for post-fire repairs to the CORSAIR expressly excluded the "Red Letter" clause. Consequently, under the circumstances, this court does not consider Ferran's limiting of its liability to $300,000.00 to be unconscionable, and hence concludes that the clause is valid. See Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S.Ct. 135, 77 L.Ed. 311 (1932).

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[6] 349 U.S. at 90, 75 S.Ct. 629.

[7] Id. at 89, 75 S.Ct. 629.

[8] 6A Corbin on Contracts, § 1472, p. 592 (1960 Ed.).

[9] Id. at 598.

[10] Id. at 599, citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

[11] Id. at 601-602: "One who employs another to install machinery and equipment can lawfully agree to exempt him from liability for negligence in the process."

[12] See Bisso, 349 U.S. at 117-121. 75 S.Ct. 629, Frankfurter, J., dissenting.

e) *Applicability of the "Red Letter" clause to Alcoa's Direct Action against Ferran's insurers.*

In addition to its action against Ferran, Alcoa sued Ferran's insurers pursuant to the Louisiana Direct Action Statute, LSA-Rev.Stat. 22:655. This Statute creates a cause of action in favor of persons injured in Louisiana which can be asserted directly against the public liability carrier of a tortfeasor, regardless of the tortfeasor's joinder in the suit. While there exists respectable authority for the proposition that suits solely *ex contractu* are not cognizable within the Direct Action Statute,[13] we need not resolve that issue here.

A mere reading of libellant's petition makes it evident that libellant seeks recovery both in contract and in tort. See Newport News Shipbuilding & Drydock Co. v. United States, 226 F.2d 137 (4th Cir. 1955). This Court's finding of tortious negligence on the part of Ferran supports the Direct Action against Ferran's insurers.

From the outset, though, Ferran's insurers have contended that they stand in the same shoes as does Ferran, especially with respect to the "Red Letter" clause's $300,000.00 limitation on liability. The issue received little attention until this court, virtually contemporaneously with rendition of the initial opinion in the present case, announced its decision in the *ITCO* case, In the Matter of Independent Towing Company,

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[13]Pennsylvania Fire Ins. Co. v. Underwriters at Lloyds' London, La. App., 140 So.2d 212 (4 Cir. 1962), cert. den. June 15, 1962; C. A. Mackey & Co., Inc. v. SS Slagen, Admiralty No. 4036, U.S.D.C., E.D.La., October 31, 1962

Inc., 242 F.Supp. 950 (E.D.La.1965).[14] There we held that the "Limitation of Vessel Owner's Liability" provisions, originally enacted by Congress in 1851,[15] created a defense to actions asserted by injured persons against vessel owners, but did not inure to the benefit of the vessel owner's insurers or the vessel's underwriters since such provisions were traditionally considered a defense personal to the vessel interests and of the type generally denied insurers by Louisiana courts. See *ITCO*, 242 F.Supp. at 954.

The *ITCO* decision built upon one corner of the Supreme Court's ruling in Maryland Casualty Co. v. Cushing, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954). In *Cushing*, the issue faced by the Court involved the compatability of the Louisiana Direct Action Statute and the same congressionally enacted limitation provisions. Under the procedural circumstances of that litigation, wherein direct actions and a limitation proceeding were pending simultaneously, but were not consolidated, Justices Frankfurter, Reed, Jackson and Burton concluded that the "direct action statute clashes with the federal system for marshalling all claims arising from certain maritime causes of action," 347 U.S. at 415, 74 S.Ct. at 611, for two reasons, one being that permitting separate judgments "would detract from the benefit of a *concursus* and undermine the operation of the congressional scheme for the 'complete and just disposition of a many cornered con-

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[14] The ITCO case was settled prior to trial on the merits, without appeal.

[15] 9 Stat. 635; now 46 U.S.C.A. § 181 et seq.

troversy.' ", 347 U.S. at 416-417, 74 S.Ct. at 612 and the other being that "[r]espect for the [federal limitation] Act precludes allowance of litigation, based on a State statute, which carries the potentiality of irreparable infringement upon federal law," 347 U.S. at 421, 74 S.Ct. at 615.

Four other members of the Court, Chief Justice Warren and Justices Black, Douglas and Minton, were of the opinion that "[n]o language in the Limited Liability Act forbids" recognition and support of the Louisiana policy of protecting people within its borders by permitting prosecution of actions directly against a tortfeasor's insurer. 347 U.S. at 438, 74 S.Ct. at 623. The remaining member of the Court, Mr. Justice Clark, proposed to accord recognition to both statutes, the federal limitation act by protecting first the "owner's purse", and the state direct action by then permitting the claimants to prosecute "the direct actions against the insurance companies on the remaining coverage of the policies." 347 U.S. at 425, 74 S.Ct. at 617.

In so stating his position, Mr. Justice Clark created two majority decisions in one case. On the one hand, by concluding *inter alia* that "limitation" and "direct action" could co-exist, he joined Chief Justice Warren and Justices Black, Douglas and Minton in holding that the Louisiana Direct Action Statute did not invariably or irreconciliably conflict with the federal limitation scheme — the *substantive* question. On the other hand, by expressly stating that the limitation proceeding should be concluded prior to a determination of the direct actions, 347 U.S. at 427, 74 S.Ct. 608,

he was joined by Justices Frankfurter, Reed, Jackson and Burton in establishing the sequence in which the two would be determined — the *procedural* question. 347 U.S. at 423, 74 S.Ct. 608.

At the time the *Cushing* decision was announced, the posture of that case and its related lawsuits was such that issuance of a stay order was equitably necessary to effectuate the procedural majority's holding. In practice, application of the principles stated in the *Cushing* case became difficult, if not impossible. See Gilmore and Black, Admiralty, §10-31, p. 715 (1957 ed.); and Ex parte Tokio Marine & Fire Insurance Co., 322 F.2d 113 (5th Cir. 1963). One problem appears to be whether the "substantive majority" exists at all. In Coleman v. Jahncke Service, Inc., 341 F.2d 956 (5th Cir. 1965), certiorari denied Jahncke Service, Inc. v. Greater New Orleans Expressway Comm., 86 S.Ct. 538 (1966), the Court recognized this substantive problem but "circumnavigated" it. See 341 F.2d at 960.

Gilmore and Black concluded that the *Cushing* case "presumably establishes a procedure to be followed by lower courts in handling *similar cases* until the Supreme Court further clarifies the isues."[16] The practice has since developed that all vessel owners praying for limitation of liability under the federal act consider themselves to be involved in "similar cases" and therefore mechanically request a broad injunction or restraining order prohibiting the filing and prosecution of actions against themselves, their insurers, vessels

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[16]Gilmore and Black, Admiralty, § 10-31, p. 715 (1957 Ed.).

and underwriters. In effect, vessel owners read *Cushing* as establishing an inflexible procedural rule: no direct action until limitation is terminated. Such a reading of course guarantees a concursus in all limitation-related proceedings, but at the same time this inflexible procedural rule denies injured claimants their right of direct action in part by delaying the filing and prosecution of the direct action. In the Eastern District of Louisiana where the largest caseload per judgeship exists, and the average delay from filing to trial approximates three years, this means that direct action-limitation claimants can anticipate an even longer delay since their state-created right can not even be filed until the limitation proceeding is terminated. But is the procedural majority's rule so inflexible? We submitted in the *ITCO* decision that it is not, and there enumerated several situations, where the recognition and prosecution of direct action rights concurrently with the limitation proceeding would not impinge on the substantive rights created by the federal limitation act. See 242 F.Supp. at 956. We concluded, in short, that the procedural majority's rule of limitation-before-direct-action should be invoked only in those situations where a substantive right might be irretrievably lost; the *Cushing* case's procedural majority rule need not be mechanically and automatically applied in all limitation-direct action situations. We consider this an equitable rule of reason, and can not countenance any conclusion that the procedural rule announced in *Cushing,* which was certainly an equitable result under the circumstances of that litigation, would produce an inflexible rule and oftentimes inequitable result. When there can arise no infringement

of a federally protected right, the Ninth[17] and Tenth[18] amendments to the Constitution of the United States require recognition and protection of a state-created right, here the right of an injured party to a direct action against the tortfeasor's insurer.[19]

One recent application of the ITCO decision's procedural rule of reason illustrates its practical flexibility. In Singer v. Dorr, 38 F.R.D. 167 (E.D.La. 1965), a widow sued for damages resulting from the wrongful

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[17]"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[18]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[19]For direct actions to be permitted at all, the cause of action must have arisen within the borders of a state permitting direct actions. See Guess v. Read, 290 F.2d 622 (5 Cir. 1961). The theoretical situation posed in Cushing where twenty people from twenty different states are injured by a large wave is, at best, a remote possibility within the borders of the two states presently recognizing direct actions, Louisiana and Wisconsin. Far more common are situations where one deckhand falls overboard from a barge on the Mississippi River, or a master is trapped in the wheelhouse of a capsized tug, or a local workman is injured when a barge being repaired explodes, or a tug and tow strikes the Lake Pontchartrain Causeway. State court direct actions in other states, if not precluded by local public policy, would in most instances be susceptible to removal and once in federal court transferable, for the convenience of the parties and the witnesses, to the district wherein the limitation proceeding is pending so that consolidation may be effected. The insurers would bear the responsibility for effecting this total consolidation. Whenever total consolidation could not for some reason, be effected, the limitation court could, in aid of its jurisdiction, at that point enjoin other actions rather than doing so at the outset. See 28 U.S.C.A. §2283 and Ex parte Tokio Marine and Fire Ins. Co., 322 F.2d 113 (5th Cir. 1963).

death of her deckhand husband who fell overboard and drowned in the Mississippi River. The suit named both the decedent's employer and its insurer as defendants. Limitation of Liability pursuant to the federal statute was asserted in the answer as a special defense. Relying on the *ITCO* decision, and exercising its discretion under Rule 42(b),[20] a discretion that would be absolutely precluded if the *Cushing* "procedural majority" were uniformly invoked in all situations, this court ordered a separate trial of the limitation of liability issues to take place subsequent to trial of the other issues. The expectation that trial of the limitation issues would be unnecessary came to realization when the jury found for plaintiff in an amount well within policy limits.

In a sense, the *ITCO* decision presupposes the existence of the *Cushing* "substantive majority." Chief Justice Warren and Justices Black, Douglas and Minton clearly refuted the insurance companies' constitutional objections urged against the Louisiana public policy as expressed in its Direct Action statute. The opening sentence of Justice Clark's concurring opinion indicates that he perceived "no necessity for invalidating Louisiana's law by dismissing these direct actions." 347 U.S. at 423, 74 S.Ct. at 615. He later stated that "[w]hen the issue is so close, I would resolve it in favor of upholding rather than invalidating a state statute," and concluded with the observation that the claimants could assert their substantive direct action rights after the limitation proceedings were concluded. 347 U.S. at 426-

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[20] F.R.Civ.P., 28 U.S.C.A.

427, 74 S.Ct. at 617. Justice Clark's attention was focused on making certain "that such [direct] actions do not interfere with the Federal Limitation proceeding." 347 U.S. at 425, 74 S.Ct. at 616. We carefully note here that, based on these excerpts, Justice Clark did not consider the Louisiana Direct Action Statute a *per se* infringement of the federal admiralty jurisdiction. In this sense he created the "substantive majority" by declaring the Direct Action statute applicable in admiralty. Only when the application of that statute in admiralty jurisdiction procedurally interfered with the federal limitation proceeding, as it did in the precise nature of the *Cushing* situation, would Justice Clark stay the direct action. Consequently, we hold that the "substantive majority" rule of *Cushing* does, in fact, exist, precluding the filing or prosecution of direct actions, or the execution of a judgment secured through a direct action, only when the direct action unreasonably interferes with the limitation proceeding.

So stated, recognition of the *Cushing* "substantive majority" lends further support to the proposition, if only by negative inference, that the "procedural majority" rule was not intended to be inflexible. Lack of interference with the limitation proceeding would permit concurrent prosecution of the direct action.

Interestingly, counsel for Alcoa subscribe to the *ITCO* rationale and in fact echo that decision's holding as legal authority for the proposition "that the 'red letter' clause does not extend in favor of the Ferran liability insurers and that the latter are liable without limita-

tion herein."[21] While it is true that insurers were denied the benefits of *statutory* federal *limitation of liability* in *ITCO*, it does not automatically follow that insurers should be denied the benefits of a *contractual limitation of liability* here. The similarities may only be superficial. Since the McCarran Act, 59 Stat. 33-34, 15 U.S.C.A. § 1011 et seq., prohibits federal regulation of the "business of insurance" and expressly reserves such regulation to "the several States,"[22] we turn to the law of Louisiana for the legal principles on which to base our resolution of the issue here presented.

Under the Louisiana Direct Action Statute, a tortfeasor and the tortfeasor's insurer are considered codebtors *in solido*, each liable for the full amount of damages suffered by an injured party. The defenses which may be asserted by each codebtor *in solido* are established by the Louisiana Civil Code:

> "Ar. 2098. A codebtor *in solido*, being sued by the creditor may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.
>
> "He can not plead such exceptions as are merely personal to some of the other codebtors."

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[21] Libellant's Memorandum in Support of Motion For Rehearing and for Supplemental and amended Findings of Fact and Conclusions of Law, p. 37.

[22] See Maryland Casualty Co. v Cushing, 347 U.S. 409, 436-437, 74 S.Ct. 608, 98 L.Ed. 806 (1954); and Coleman v. Jahncke Service, Inc., 341 F.2d 956, 960-961 (5 Cir. 1956), cert. denied, Jahncke Service, Inc. v. Greater New Orleans Expressway Comm., 86 S.Ct. 538 (1966).

This codal article permits an insurer to assert three types of defenses:

(1) Those resulting from the nature of the obligation;

(2) Those which are personal to the insurer; and

(3) Those which are common to all the codebtors;

but prevents the insurer from asserting as a defense one which is merely personal to another codebtor.

In the *ITCO* decision we referred to numeous examples of defenses which are considered "personal" under Louisiana law, and hence defenses which cannot be asserted by a tortfeasor's insurer. These defenses included infancy, LSA-Rev.Stat. 9:571 and Rouley v. State Farm Mutual Automobile Ins. Co., 235 F. Supp. 786, 793 (W.D.La.1964); coverture, Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935) and Dumas v. United States Fidelity & Guaranty Co., 241 La. 1096, 134 So.2d 45, 50 (1961); charitable immunity, Lusk v. United States Fidelity & Guaranty Co., La. App., 199 So. 666 (Orleans 1941); and governmental immunity, Brooks v. Bass, La. App., 184 So. 222 (Orleans 1938), certiorari denied, November 28, 1938. As succinctly stated in Simmons v. Clark, La.App., 64 So.2d 520 (1 Cir. 1953), "[p]ersonal defenses are such as infancy, interdiction, coverture, lunacy, bankruptcy and the like." 64 So.2d at 523. In ITCO we merely added to this list "vessel owners who assert their federally created right of limitation of liability."

Amongst these apparently varied "personal" defenses, one common denominator is discernible — each person possessing a "personal" defense obtained that defense because the law granted it to all members of his class as a matter of public policy. The personal defense attaches to the status. Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and the like possess a defense denied their respective insurers.

On the other hand, insurers may assert defenses which result from the nature of the obligation — contributory negligencse, assumption of risk, confusion, collateral estoppel, and res judicata, for example, as well as those common to all codebtors. In tort actions, most conceivable defenses common to all codebtors will arise from the nature of the obligation. Additionally, insurers enjoy and frequently assert defenses personal to themselves, such as coverage, policy limits, and procurement by misstatement of material facts in the application. Not having been mentioned in the "Red Letter" clause, Ferran's insurers cannot claim the limitation provision therein as their personal defense. The defense asserted here by Ferran stems from the repair contract which established the relative rights and obligations between Ferran and Alcoa. Ferran breached its duty and thereby became obligated to Alcoa. But the agreement between these two parties stated that Ferran's obligation would not exceed $300,000.00. This limitation of liability constitutes a defense resulting from the nature of the obligation within the plain meaning of Article 2098. Here the size of

the obligation was part of the obligation. No codal article, no statute, no jurisprudential rule grants ship repairers any given immunity or limitation merely because of their status as ship repairers. The public policy favoring infants, interdicts, wives, lunatices, bankrupts, vessel owners and the like has not been extended to ship repairers.

We therefore conclude that the "Red Letter" clause's limitation of liability provisions constituted part of the obligation and created a defense inuring to the benefit of Ferran's insurers as contemplated by Louisiana Civil Code Article 2098. To hold otherwise would effectively nullify practically all liability limitations contained on coat and hat checks, parking garage stubs, automotive and other consumer goods guarantees, and a myriad of similar contractual agreements. Insurers are not entitled to benefit from a defense based on the insured's publicly protected legal status, but should benefit from the contractual defenses of their insured.

f) *Avoidable Consequences Doctrine.*

In our original opinion certain instances of conduct and conditions attributable to Alcoa, and Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947 (5 Cir. 1956), were relied upon as authority for invocation of the "Avoidable Consequences" doctrine. These instances included the location of the quick shut-off valve in relation to the boilers, the uncontrolled ventilating system, the locked CO_2 room, the crew's unfamiliarity with the location of remote control de-

vices, and the opened passageway doors.[23] Counsel for Alcoa urges numerous legal arguments in support of their contention that the "Avoidable Consequences" doctrine is here inapplicable. Several of Alcoa's arguments, but not all, are well founded.

Considering initially Alcoa's argument that the "Avoidable Consequences" doctrine does not apply to conditions or conduct attributable to Alcoa which preceded Ferran's negligence, we are constrained to agree. This Court held that the fire was started solely through Ferran's negligence, and not by Alcoa's negligence or the CORSAIR'S unseaworthiness, that is, not by the shut-off valve's location, nor by the ventilators, nor by the locked CO_2 room, nor by the CORSAIR'S crew, nor by the open doors. Ferran cannot be heard to complain that these conditions existed since a tortfeasor is considered to take his victim as he finds him.[24] The tortfeasor is only responsible, however, for those damages which proximately result from his negligent conduct.

The "Avoidable Consequences" doctrine denominates a corollary to this general rule of damages wherein an injured party is required to exert reasonable efforts to minimize the extent of his damages after he has been

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[23] See 242 F. Supp. at 974.

[24] "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct." Restatement of Torts 2d, § 461.

tortiously injured. Irrespective of the variable conceptual explanations supporting the "Avoidable Consequences" doctrine the Fifth Circuit Court of Appeals in Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947 (1956), adopted the rationale espoused in the Restatement:

> "[A] person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort." Restatement of Torts, § 918.

As a result, Alcoa was obliged to exercise due care after the commission of the tort to mitigate its damages, failing which, Alcoa would be precluded from recovering that portion of its damages resulting from its lack of due care.[25]

Alcoa cannot sit back without taking timely action and then attempt to escape the obligation to exercise due care in avoiding damages by relying on insurance coverage or an indemnity situation arising from a breach of the repair contract. Even though Alcoa might, in some circumstances, be entitled to full indemnity when Ferran breaches its warranty of workmanlike service, where possible, Alcoa must still exercise due care to mitigate its damages. "[P]ublic pol-

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[25]The test used in applying the avoidable consequences doctrine is one of "due care". Hence, even assuming arguendo that Alcoa owed its ship's repairer, Ferran, the warranty of seaworthiness, unseaworthiness would be irrelevant since it involves liability regardless of due care.

icy requires that persons should be discouraged from wasting their resources both physical or economic." Restatement of Torts, § 918, p. 602; Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947, 954 (5 Cir. 1956). See also Restatement of Torts, § 918, especially Illustration 7 at pp. 604-605. It therefore becomes necessary to determine whether Alcoa's action subsequent to the negligence of Fereran constituted a failure to make reasonable efforts towards diminishing its damages.

As the Fifth Circuit clearly recognized in the *Southport Transit* case, applicability *vel non* of the "Avoidable Consequences" doctrine is a *question of damages*, not one of liability. See 234 F.2d at 954. At the start of the trial in this matter, the parties, by stipulation, reserved determination of quantum of damages and tried only the question of liability. The facts presented during the trial concerned, for the most part, only liability. From the present state of this record, facts relating to possible reduction of any damage award due to Alcoa's failure to mitigate such damages were not presented with sufficient particularity to support a finding, one way or the other. We here merely note that the "Avoidable Consequences" doctrine, or some other rule of damages, may be applicable. Conversely, the facts may indicate that all of the damages were causally related only to Ferran's initial negligence.

As part of the original stipulation that determination of damages would be deferred, it was understood by the parties and the Court that if within a reasonable time after the liability issues were resolved by this court,

no agreement as to quantum of damages was reached, a Special Master would be appointed to decide the damages question. Therefore,

It is ordered that Richard B. Montgomery, Esq., 806 National Bank of Commerce Bldg., New Orleans, La., 70112, be and he is hereby appointed Special Master to hear and determine the question of damages in this action including the question of the total damages resulting from the fire aboard the S. S. ALCOA CORSAIR on October 6, 1956, the question of the failure, if any, of Alcoa, its agents or employees to exercise due care in diminishing Alcoa's damages, and the question of the rule of damages to be applied in this case; this appointment is subject to the condition that it will be automatically terminated, without cost to the parties or fees to the Special Master, if within thirty (30) days from date hereof the parties shall notify the Court and the Special Master that they have agreed, stipulated, or compromised all questions of damages referred to or referable to the Special Master.

APPENDIX E

Statutes Involved

19 U.S.C.A. 257. Duty on equipments or repair parts for vessels

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be

used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

Louisiana Revised Statutes 22:655

Section 655. Liability policy; insolvency or bankruptcy of insured; direct action against insurer

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the

insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors hereinabove referred to, or heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against both the insured and insurer, jointly and in solido, at either of their domiciles or principal place of business in Louisiana. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all the lawful conditions of the policy or contract and the defenses which could be urged

by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 218

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

versus

CHARLES FERRAN & COMPANY, INC., GLENS FALLS INDEMNITY COMPANY, UNDERWRITERS AT LLOYDS LONDON, ANDREW WEIR INSURANCE CO., LTD., FINE ART & GENERAL INSURANCE CO., LTD., NATIONAL PROVINCIAL INSURANCE CO., LTD., ORION INSURANCE COMPANY, LTD., ENGLISH & AMERICAN INSURANCE CO., LTD. "M", AND ECONOMIC INSURANCE COMPANY, LTD., "M" a/c,
Respondents.

BRIEF IN BEHALF OF EXCESS UNDERWRITERS IN OPPOSITION TO PETITION FOR CERTIORARI BY ALCOA STEAMSHIP COMPANY, INC.

NOW INTO COURT come Charles Ferran & Company, Inc., Glens Falls Indemnity Company, Underwriters at Lloyds London, Andrew Weir Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., National Provincial Insurance Co., Ltd., Orion Insurance Company, Ltd., English & American Insurance Co., Ltd. "M", and Economic Insurance Company, Ltd., "M"

a/c, Respondents, and file this, their opposition to the petition for certiorari by Alcoa Steamship Company, Inc.

This suit claims damages to property only, for no personal injuries are involved. We submit that this Court lacks jurisdiction under Rule 19, and that on the facts found by the District Court and affirmed by the Court of Appeal, all factual issues are final. Finally, the alleged errors of law are without merit.

It is very significant to observe that in the petitioner's Statement of the Case there is no mention whatever made of the fact that Alcoa has actually been allowed a potential recovery, up to an amount not to exceed $300,000.00, but that ultimate recovery may be far less, depending upon the outcome of the findings yet to be handed down by the Special Master to whom the proration of damages was referred. It is very possible that Alcoa will take nothing. The red letter clause by its very terms comes into play only after the damages have reached $300,000.00, the ultimate determination of which is impossible to predict until the case shall have been finally resolved.

The basic fact here is that there is no application of the red letter clause protection below the very substantial amount of $300,000.00. The sole and only question before this Court then is whether or not the excess underwriters, in the event of a final judgment for more than $300,000.00 can be protected by contractual limitation. Our contention is in the affirmative as the District and Circuit Courts held.

The District Court found, and the Court of Appeal affirmed, that the red letter clause was an integral part of shipbuilding contracts in the trade, and of this contract in particular. There is no difference in law between the fact finding reached by the courts below, and a situation where a similar stipulation is expressly provided for in a written contract under seal, because the District Court found as a fact that the clause was an integral part of the agreement.

The Circuit Court found that there is nothing inconsistent with the legal conclusion reached in upholding the red letter clause as against any alleged overriding federal admiralty policy. The petition is devoid of any meritorious attack on this actual conclusion, for the petition is also devoid of any authorities which would support the contention that there has been a violation of the general admiralty law in upholding a $300,000.00 limit stipulated by contract, as both District and Circuit Courts found and held. Further, the petition does not touch on the fact that the arrangement involving the red letter clause with its $300,000.00 limitation, was long existent as part of an understanding with Alcoa for Ferran to handle all of the repairs to the Corsair when she was in New Orleans. (See page 32 of the petition in citing the Circuit Court's decision.) There was no monopoly because Alcoa had the freedom to change repairmen at pleasure.

We submit that under the general maritime law the parties are free to contract in any manner, and may stipulate with regard to any provisions, provided they do not violate public policy. There is no public policy

involved here which is violated by this very substantial $300,000.00 limitation. We submit that an examination of the authorities set forth in the petition discloses that they simply do not present any public policy applicable to these facts. On the contrary the red letter clause has been recognized as valid in decisions by other courts.

I. JURISDICTION

Petitioner's sole contention as to the jurisdiction of this Court is stated on page 2, as follows:

> "The jurisdiction of this Court is invoked under 28 USCA 1254(1)."

There is no further explanation with regard to the guidelines set forth under Rule 19 of this Court which reads:

> "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore

determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is, therefore, rather difficult to ascertain the precise claim to jurisdiction without petitioner so specifying. Obviously, this is not a petition to review a state court decision and, therefore, Section (a) of Rule 19 is inapplicable. But whether petitioner contends that the Court of Appeal has rendered a decision in conflict with another on the same matter, or the case involves an important state or territorial question in a way to conflict with applicable state or territorial law, or the decision is an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way to conflict with applicable decisions of this Court, or has so far

departed from the accepted and usual course of judicial proceedings, is far from clear.

Nonetheless three attacks have been alleged in the petition, namely, inclusion of the red letter clauses by implication, refusal to follow public policy considerations by this Court, and the interpretation of the Louisiana Direct Action Statute as to applicability to underwriters. We submit that none of these three questions falls within Rule 19, and that, accordingly, there is a lack of compliance with Rule 19.

II. THE QUESTIONS PRESENTED

1. *Alleged Incorporation by Implication*

What the petitioner means by the expression "incorporated in that agreement by implication" is difficult to comprehend. It can hardly be contended that the red letter clause was implied, when it actually appeared in red ink on the invoice similar to those invoices repeatedly used on previous repair contracts between these two parties in the following terms:

> *"We contract only upon the following terms, applicable to every contract;* in the case of a vessel we have a lien upon the vessel for our bills; all time contracts are subject, without responsibility on our part, to delay in case of strike, labor difficulties, fire or causes beyond our control; or liability in case of defective workmanship or material is limited strictly to the proper replacement thereof.

"Furthermore, we undertake to perform work on vessels and provide berth, wharfage, towage and other services and facilities only upon condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract, tort or otherwise, to its owners, charterers or underwriters for any injury to such vessel, its cargo, equipment or movable stores, or for any consequences thereof, unless such injury is caused by our negligence or the negligence of our employees and *in no event shall our aggregate liability to all such parties in interest for damage sustained by them, as a result of such injury, exceed the sum of $300,000.00.*

"In connection with the *accident and/or indemnity* and/or *insurance clauses,* if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligation to take out or maintain insurance beyond the liabilities or the obligations to insure imposed upon us by law." (Emphasis supplied)

In addition to its previous use between the parties, it was stipulated between counsel as follows (R 202):

"MR. BAGLEY: I'm sorry — I don't want to interrupt Mr. Sarpy, but I think we are willing to stipulate this practice was carried out: There was a practice which had been pre-

existing that the repairs were made on oral agreement generally; that there was no documents exchanged between the parties prior to the time of the repairs; and that although the specifications or the re-write specifications sent by Ferran, which was the first document received by ALCOA, did not have the red letter clause, and when the billing was finally received from Ferran and on the invoices on their jobs and on prior similar jobs, the bills would be received on letterheads having this so-called red letter clause, which would be similar to all of these contracts.

"MR. SARPY: We will stipulate to all of this, except one thing, with regard to the written documents that may have been exchanged between the parties prior to the repairs on this particular job. Otherwise, the stipulation is all right.

"MR. BAGLEY: We also would like understood that this stipulation includes the fact that there was no discussion of or agreement on the red letter clause between anyone in Ferran's office and anyone in ALCOA's office.

"MR. SARPY: One way or the other — we will admit that. And that since that time and up to now the red letter clause is still being used in ship repair contracts in which ALCOA participates, in the port of New Orleans.

"MR. BAGLEY: Now, in ship repair contracts by Ferran and or by others?

"MR. SARPY: Between ALCOA and any ship repair concern, whether it be Ferran or anybody else, such as Todd, Boland Machine —

"MR. BAGLEY: We will stipulate to this extent, Mr. Sarpy, that we know that the practice of the repair yards generally is to send out something in the nature of an invoice or other document which contains the red letter clause, and that ALCOA will in the course of its operations receive and has continued to receive from repair contractors documents bearing this red letter clause.

"MR. SARPY: Up to the preesnt time?

"MR. BAGLEY: Up to the present time.

"MR. SARPY: And further, that ALCOA had made no objections to the red letter clause in this case —

"MR. BAGLEY: Well, the position of ALCOA in this case, I think has been fairly clearly set out by us that we do not believe that the red letter clause became a part of this contract; that this contract was an oral agreement, which did not incorporate by any expressed terms prior to the fire the red letter clause.

"MR. SARPY: I understand but you made no objection, no one connected with ALCOA did anything to indicate their intentions to exclude the red letter clause in this particular case.

"THE COURT: Neither to include or to exclude."

The District Court consequently found the following fact among others:

"The Court finds as a matter of fact that the red letter clause was common in the trade and had been used by Ferran on many prior occasions in billing Alcoa for repair work and had been used on other Alcoa repair jobs subsequent to the incident. * * *"

Therefore, the District Court found, and the Court of Appeal affirmed, that the evidence fully established the clause as an integral part of the contract and accordingly we submit that it is every bit as binding as if it had been incorporated in a formal document under seal.

How the petitioner can contend in light of the foregoing that the clause was included by implication, is rather difficult to understand, in addition to the agreement for it was expressly agreed by stipulation. There is no provision in the law (for, if there were able counsel for petitioner would have cited it) to the effect that a shipbuilding contract must be in writing. It is

also fundamental that in ship repair contracts the law has never required any particular stipulations to be reduced to writing, for anything that is valid can be stipulated by the parties, whether orally or in writing. It is then only a question of proof which the District Court and Circuit Court must resolve. Here, the District Court found, and the Circuit Court affirmed, that the agreement for red letter clause did exist. There can be no manifest error in this factual determination.

Therefore, we respectfully urge that the "inclusion by implication" attack is threadbare, for there has been an inclusion by well-buttressed actuality, not implication. And even if by implication, such is a factual finding and is final in the absence of manifest error.

2. *Public Policy*

We fully agree that the contract in question was a maritime contract, and that any recognized principles of the General Maritime Law, as well as the Acts of Congress pursuant to the grant of admiralty jurisdiction in the Constitution, must prevail over any precepts of law in any other field. But petitioner has cited no authorities in support of any theory which demonstrates that principles of maritime law do exclude this red letter clause from this particular contract. Likewise, it has not advanced any reference to any Act of Congress on the subject of public policy outlawing such a contract. We must, therefore, go dehors the General Maritime Law and since 1938 under Justice Brandeis' historic opinion in *Erie R. Co. v.*

Tompkins, 304 U.S. 64, 82 L.Ed. 1188 we must look to the state law.

Petitioner's references to decisions are scant. In *California Tanker Company v. Todd Shipyards Corporation,* 339 Fed.2d 426 (C.A. 2, 1964) the Court observed that with respect to a red letter clause the party had "contrived the reproduction of it in such fine print as to be readable only by the use of a magnifying glass." This record at bar is devoid of any evidence that a magnifying glass was required for the reading of this invoice. Indeed, a simple perusal of the clause is quite readable by a person with ordinary vision and without the use of spectacles or a magnifying glass. The *California* case involved only an interpretation which is not an issue here. Moreover, the Courts found in the case at bar that the red letter clause was general in the trade, and was particularly well known between these contracting parties, between whom the clause had been used repeatedly in previous repair contracts, and as the stipulation bears out. The citation is no help.

On page 5 of the petition are cited *Bisso v. Inland Waterways Corporation,* 349 U.S. 85; *Boston Metals Company v. SS Winding Gulf,* 349 U.S. 122, and *United States v. Nelson,* 349 U.S. 129. Not one of these decisions in anywise discusses the red letter clause. *Bisso* involved a full, absolute and complete defense against all liability for negligence of a tug boat operator in a towage agreement. The following two decisions on the same day were on the very same principie, and were all decided contemporaneously.

It is fundamental in the law of contracts that the parties are free to stipulate anything which does not offend public policy, and this rule avails whether the contract be construed according to the maritime law or the state law. No federal or state statute has been cited to the contrary.

And here the maritime law is silent on the subject, so admiralty must, therefore, apply equitable principles and revert to the law of the states, see Benedict on Admiralty, 6th Edition, Volume 1, paragraph 71, page 148, *Erie R. Co. v. Tompkins,* supra.

The contract here was made in Louisiana and executed in Louisiana and therefore, in the absence of general maritime law on the subject, the provisions of the Louisiana law apply.

Article 11 of the Louisiana Civil Code provides:

> "All things that are not forbidden by law may legally become the subject of or the motive for contracts.
>
> "Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.
>
> "But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights

of others, and is not contrary to the public good."

In light of the foregoing the *Bisso* decision, which seems to be the only ground for the principal attack, has no valid application because here there is no contract of common carriage.

It is to be observed that whereas the petition cites the *Bisso* case, it carefully avoids *Sun Oil v. Dalzell Towing Co.*, 287 U.S. 294, which the District Court had cited as authority and which the Supreme Court distinguished in *Bisso*. See 349 U.S. at p. 96.

The *Bisso* decision has no application to this case for several reasons. First, in *Bisso* there was a towage contract in which all negligence of the tower had been precluded in its entirety. Because it was a towage contract the recognized rule against exoneration from liability by common carriers for the tower's own negligence was applied, and the clause was declared illegal by the Supreme Court of the United States. Another wide difference is that in Bisso the limitation was absolute, whereas here it is remote and relative, to the extent that the liability of Ferran for its own negligence was left wide open up to the sum of $300,000.00. This simply meant that Ferran was to insure to $300,000.00 and Alcoa assumed the excess. The cost of the repairs including insurance was affected accordingly.

Sun Oil Company v. Dalzell Towing Company, 278 U.S. 271, 77 L.Ed. 311, 53 Supreme Court 135 (1932), involved a pilotage situation which contained a stipula-

tion against recovery by the vessel owner resulting from the pilot's negligence, and this stipulation was upheld by the Supreme Court of the United States. In the subsequent *Bisso* decision the *Sun Oil* case was clearly distinguished on that ground. In *Sun Oil* the Supreme Court upheld the clause whereby a tug owner furnishing tugs to take a vessel through certain waters contracted with the owner of the vessel that when the tug captain boarded the vessel using her own power, such captain became the servant of the vessel owner and accordingly the tugs and their owners would not be liable for any resulting damage. The Court pointed out that respondent was not a common carrier or bailee, see 287 U.S. 294, and concluded that the parties were on equal footing and at arm's length;

> "There is no rule of public policy which derives effect and their expresed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*
>
> * * *
>
> "It would be unconceivable for petitioner upon concurrence of a mishap to repudiate the agreement upon which it obtained the service." (Emphasis supplied)

Hence, unless the *Bisso* decision can be stretched very thinly to the factual situation in this case, it clearly has no application. This matter involves a ship

repair contract and is not in anywise related to a contract of carriage, and certainly not to a contract of common carriage or bailment. The *Bisso* decision is, therefore, a very narrow holding applicable only to towage contracts and contracts of common carriage and has no effect here.

Even assuming but not admitting that *Bisso* does apply to ship repair contracts, the nature of the red letter clause here differs very widely from *Bisso*, because here there is no application of the absolute exoneration from liability below the sum of $300,000.00, for it is only in excess of that amount that the exoneration applies. Petitioner has cited no decisions and no authorities that would outlaw this limitation, which we submit was made at arm's length, under reasonable conditions, and with a realistic fair outlook on the rights of both parties, particularly with regard to insurance rates. We therefore submit that the complaint of the red letter clause violating public policy is entirely without merit.

3. *The Louisiana Direct Action Statute Applies to Ferran's Indemnity.*

The District Court opinion is unanswerable on the legal right of the vessel's underwriters to invoke the red letter clause as a defense, which they did.

Louisiana's direct action statute (La. Rev. Stat. 22:655) reads in part:

"The injured person or his or her survivors or

> heirs hereinabove referred to at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against *both the insured and insurer jointly and in solido,* at the domicile of either or their principal place of business in Louisiana." (Emphasis Added)

It is glaring that the statute gives a direct action which *"may be brought against the insurer alone or against the insured and insurer 'jointly and in solido'* * * *."

The law is clear as to what "jointly and in solido" means. Louisiana Civil Code Articles 2082, 2083, 2091, 2093, 2098 and 2107 read as follow:

> "Art. 2082. When several persons obligate themselves to the obligee by the terms in solido, or use any other expressions, which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation in solido on the part of the obligors."

> "Art. 2083. In like manner, when the obligor contracts expressly, or by using the technical words in solido, that he will give to either one, or to all of several obligees the right of en-

forcing the obligation against him, *it creates an obligation in solido in favor of the obligees.*"

"Art. 2091. There is an obligation in solido on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

"Art. 2093. An obligation in solido is not presumed; it must be expressly stipulated.

This rule ceases to prevail only in cases where an obligation in solido takes place of right by virtue of some provisions of the law."

"Art. 2098. *A codebtor in solido, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation,* and all such as are personal to himself, as well as such as are common to all the codebtors.

He can not plead such exceptions *as are merely personal to some of the other codebtors.*"

"Art. 2107. There are many contracts in which the obligation is declared by law to be in solido, without any express stipulation to that effect; these will be found in the different chapters which treat of such contracts." (Emphasis supplied)

Applying the statutory and code language to the situation, there is no proper denial that the underwriters are liable "jointly and in solido" with Ferran.

As the District Court with complete logic stated in its second opinion, 251 F.Supp. 831,

> "The defense (red letter clause) asserted here by Ferran stems from the repair contract which established the relative rights and obligations between Ferran and Alcoa."

and furthermore

> "This limitation of liability constitutes a defense resulting from the nature of the obligation within the plain meaning of Article 2098."

Nothing could be more concise and logical.

Now against this what does Alcoa contend? They contend that they sue the underwriters by virtue of the breach of Ferran's agreement with Alcoa, but seek to preclude the underwriters from the protection of the very same agreement, thus seeking a one way street, a unilateral benefit, a shooting from behind a blind, which is illogical, unfair and contrary to law. Alcoa invokes the favorable portions of the Louisiana statute but would deny the appellees the portions which are unfavorable to Alcoa. For support of this advocated arbitrary result they cite several decisions which we shall analyze.

Maryland Casualty Company v. Cushing (pp 5, 11) involved the Federal Maritime limitation statute which the instant case does not. The question was whether the Federal Law was in conflict with and hence controlled over the state statute, and on which the Court was equally divided. The case was remanded and continued until the completion of the limitation proceeding. The case has no effect in the instant case where no federal statute is involved, but on the contrary the state law clearly favors Ferran and its underwriters.

Then they cite *Herd & Company v. Krawill* (pp 6, 8, 12) to show that statutory and contractual limitations are to be strictly construed. Under the strictest interpretation the insurer here is liable "jointly in solido" and as such entitled to the very same benefit and defense of the clear contractual limitation language. *Herd,* therefore, has no application.

Musmeci v. American Automobile Insurance Company (pp 11) affords Alcoa no solace, for it involved an attempted defense of sovereign immunity. It was not a defense stemming from the nature of the contract. Likewise it has no application.

Here the defense of the contractual limitation not only arises from the nature of the contract but from its very literal provisions. Alcoa has not cited one Louisiana case where the defense arose from the contractual provisions and was denied. The Louisiana Civil Code Articles are clear and unambiguous. The contractual limitation is clear and unambiguous. There is no personal limitation such as coverture and

sovereign immunity. Alcoa's argument is threadbare for it is simply unsupported by legal authority.

We have demonstrated that the Civil Code grants to Alcoa's underwriters the defense set forth literally in the contract itself. There is nothing strictly personal in this defense. Consistent with all Civil Code Articles and decisions under them, the District Court was eminently correct in granting the contractual defense in the red letter clause to the excess underwriters, and the court of appeals affirmed.

III. CONCLUSION

Alcoa is bound by its own arm's length bargain and must accept the bad with the good.

There is no "severely imbalanced hand" as the District Court pointed out. From these facts monopoly cannot be inferred. Alcoa bears very heavy burden of proving that this reasonably qualified limitation in excess of $300,000.00 is invalid. In this it has failed. Under both Louisiana law and general maritime law the clause is valid. On the direct action statute, State interpretative decisions must be recognized by the Federal Courts under *Erie v. Tompkins,* supra.

We recapitulate, first, the petition does not set forth requisite jurisdictional statement under Rule 19 of this Court. Secondly, on the merits, the three contentions are meritless because a) the clause is essentially a part of the contract, having been found to constitute a valid provision by the District and Circuit Courts,

b) there is no showing of any public policy violation, and c) the State statute protects Ferran and also its underwriters with full vigor.

The petition should be dismissed.

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The undersigned proctor for respondents hereby certifies that copies of the above and foregoing Brief have been served on all proctors of record.

New Orleans, Louisiana, July ____, 1968.